CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, and Notices

Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 28 JANUARY 19, 1994 NO. 3

This issue contains:

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

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U.S. Customs Service

Treasury Decisions

(T.D. 94–7)

FOREIGN CURRENCIES

QUARTERLY RATES OF EXCHANGE:
JANUARY 1 THROUGH MARCH 31, 1994

The table below lists rates of exchange, in United States dollars for certain foreign currencies, which are based upon rates certified to the Secretary of the Treasury by the Federal Reserve of New York under provisions of 31 U.S.C. 5151, for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Country	Name of currency	U.S. dollars
Australia	Dollar	$0.684000
Austria	Schilling	0.081606
Belgium	Franc	0.027533
Brazil	Cruzado	N/A
Canada	Dollar	0.760167
China, P.R.	Renminbi yuan	0.114657
Denmark	Krone	0.146983
Finland	Markka	0.171792
France	Franc	0.168691
Germany	Deutsche mark	0.574053
Hong Kong	Dollar	0.129433
India	Rupee	0.031807
Iran	Rial	N/A
Ireland	Pound	1.405000
Italy	Lira	0.000586
Japan	Yen	0.008889
Malaysia	Dollar	0.374462
Mexico	Peso	0.321750
Netherlands	Guilder	0.512899
New Zealand	Dollar	0.562000
Norway	Krone	0.132564
Philippines	Peso	N/A
Portugal	Escudo	0.005659
Singapore	Dollar	0.619963
South Africa, Republic of	Rand	0.294074
Spain	Peseta	0.006973
Sri Lanka	Rupee	0.020251

FOREIGN CURRENCIES—Quarterly rates of exchange: January 1 through March 31, 1994 (continued):

Country	Name of currency	U.S. dollars
Sweden	Krona	$0.119276
Switzerland	Franc	0.670691
Thailand	Baht (tical)	0.039093
United Kingdom	Pound	1.476000
Venezuela	Bolivar	N/A

Dated: January 3, 1994.

MICHAEL MITCHELL,
Chief,
Customs Information Exchange.

(T.D. 94–8)

FOREIGN CURRENCIES

DAILY RATES FOR COUNTRIES NOT ON QUARTERLY LIST FOR DECEMBER 1993

The Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Holiday: None.

Greece drachma:

December 1, 1993	$0.004056
December 2, 1993	.004042
December 3, 1993	.004049
December 6, 1993	.004083
December 7, 1993	.004083
December 8, 1993	.004103
December 9, 1993	.004101
December 10, 1993	.004120
December 13, 1993	.004088
December 14, 1993	.004072
December 15, 1993	.004069
December 16, 1993	.004082
December 17, 1993	.004082
December 20, 1993	.004062
December 21, 1993	.004072
December 22, 1993	.004090
December 23, 1993	.004101
December 24, 1993	.004094
December 27, 1993	.004094
December 28, 1993	.004090
December 29, 1993	.004050
December 30, 1993	.004004
December 31, 1993	.004000

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for December 1993 (continued):

South Korea won:

December 1, 1993	$0.001233
December 2, 1993	.001232
December 3, 1993	.001232
December 6, 1993	.001231
December 7, 1993	.001231
December 8, 1993	.001231
December 9, 1993	.001231
December 10, 1993	.001231
December 13, 1993	.001231
December 14, 1993	.001230
December 15, 1993	.001229
December 16, 1993	.001229
December 17, 1993	.001229
December 20, 1993	.001229
December 21, 1993	.001227
December 22, 1993	.001227
December 23, 1993	.001229
December 24, 1993	.001232
December 27, 1993	.001233
December 28, 1993	.001233
December 29, 1993	.001232
December 30, 1993	.001232
December 31, 1993	.001233

Taiwan N.T. dollar:

December 1, 1993	$0.037136
December 2, 1993	.037153
December 3, 1993	.037164
December 6, 1993	.037198
December 7, 1993	.037189
December 8, 1993	.037204
December 9, 1993	.037227
December 10, 1993	.037250
December 13, 1993	.037265
December 14, 1993	.037275
December 15, 1993	.037355
December 16, 1993	.037445
December 17, 1993	.037566
December 20, 1993	.037467
December 21, 1993	.037383
December 22, 1993	.037383
December 23, 1993	.037456
December 24, 1993	.037511
December 27, 1993	.037509
December 28, 1993	.037523
December 29, 1993	.037532
December 30, 1993	.037486
December 31, 1993	.037557

Dated: January 3, 1994.

MICHAEL MITCHELL,
Chief,
Customs Information Exchange.

(T.D. 94–9)

FOREIGN CURRENCIES

VARIANCES FROM QUARTERLY RATES FOR DECEMBER 1993

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, and reflect variances of 5 per centum or more from the quarterly rates published in Treasury Decision 93–82 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Holiday: None.

Australia dollar:

December 22, 1993	$0.680000

Austria schilling:

December 1, 1993	$0.082850
December 2, 1993	.082576
December 3, 1993	.082624
December 15, 1993	.082850
December 29, 1993	.082781
December 30, 1993	.081967
December 31, 1993	.081733

Germany deutsche mark:

December 1, 1993	$0.582242
December 2, 1993	.580720
December 3, 1993	.580889
December 14, 1993	.583363
December 15, 1993	.582649
December 20, 1993	.583567
December 29, 1993	.582072
December 30, 1993	.576369
December 31, 1993	.574878

Italy lira:

December 1, 1993	$0.000583
December 2, 1993	.000579
December 3, 1993	.000584
December 6, 1993	.000593
December 7, 1993	.000597
December 8, 1993	.000598
December 9, 1993	.000596
December 10, 1993	.000597
December 13, 1993	.000592
December 14, 1993	.000591
December 15, 1993	.000591
December 16, 1993	.000592
December 17, 1993	.000593
December 20, 1993	.000596
December 27, 1993	.000597

FOREIGN CURRENCIES—Variances from quarterly rates for December 1993 (continued):

Italy lira (continued):

December 28, 1993	$0.000595
December 29, 1993	.000589
December 30, 1993	.000585
December 31, 1993	.000582

Japan yen:

December 27, 1993	$0.008966
December 29, 1993	.008961
December 30, 1993	.008929
December 31, 1993	.008953

Malaysia dollar:

December 30, 1993	$0.371333
December 31, 1993	.371058

Netherlands guilder:

December 1, 1993	$0.519049
December 2, 1993	.517786
December 3, 1993	.517974
December 29, 1993	.519642
December 30, 1993	.515013
December 31, 1993	.513558

Norway krone:

December 30, 1993	$0.133129
December 31, 1993	.132767

Portugal escudo:

December 30, 1993	$0.005659
December 31, 1993	.005651

Spain peseta:

December 1, 1993	$0.007085
December 2, 1993	.007049
December 3, 1993	.007038
December 6, 1993	.007121
December 7, 1993	.007168
December 8, 1993	.007193
December 9, 1993	.007185
December 10, 1993	.007199
December 13, 1993	.007152
December 14, 1993	.007144
December 15, 1993	.007102
December 16, 1993	.007105
December 17, 1993	.007132
December 20, 1993	.007119
December 21, 1993	.007143
December 22, 1993	.007160
December 23, 1993	.007179
December 24, 1993	.007168
December 27, 1993	.007160
December 28, 1993	.007140

FOREIGN CURRENCIES—Variances from quarterly rates for December 1993 (continued):

Spain peseta (continued):

December 29, 1993	$0.007065
December 30, 1993	.007008
December 31, 1993	.006986

Switzerland franc:

December 1, 1993	$0.668226
December 2, 1993	.667646

Dated: January 3, 1994.

MICHAEL MITCHELL,
Chief,
Customs Information Exchange.

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Dominick L. DiCarlo

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Decisions of the United States Court of International Trade

(Slip Op. 93–229)

(PUBLIC VERSION)

E.I. DU PONT DE NEMOURS & CO., INC., ICI AMERICAS, INC., AND HOECHST CELANESE CORP., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND CHEIL SYNTHETICS, INC., SKC LTD., AND SKC AMERICA, INC., DEFENDANT-INTERVENORS

Court No. 91–07–00487

[Plaintiffs in this case challenge the ITA's final results of the administrative review of antidumping findings. *Held:* The case is remanded in part for reexamination of Commerce's methodology for calculating cost of production, choice of cost accounting methodology, and recalculation of value-added tax adjustments.]

(Dated December 6, 1993)

Wilmer, Cutler & Pickering, (John D. Greenwald, Stravros J. Lambrinidis), Howrey & Simon, (Michael A. Hertzberg, Matthew J. Clark, Paul M. Orbach) for plaintiffs E.I. DuPont de Nemours & Co., Inc., ICI Americas Inc., and Hoechst Celanese Corporation.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice; *(Michael Kane, Vanessa P. Sciarra), Stephen J. Claeys,* of counsel for Import Administration for defendant.

Akin, Gump, Hauer & Feld, (Edith E. Scott, Warren E. Connelly) for defendant-intervenor Cheil Synthetics, Inc.

Donovan Leisure Newton & Irvine, (Michael P. House, R. Will Planert, Raymond Paretzky) for defendant-intervenor SKC Limited and SKC America, Inc.

OPINION

MUSGRAVE, *Judge:* Confidential material appears in the confidential version of this opinion in brackets and is deleted from the public version of the opinion.

In this action, plaintiffs E.I. DuPont de Nemours & Co., Inc., ICI Americas Inc., and Hoechst Celanese Corporation challenge the final results of the administrative review of antidumping findings announced in two determinations by the International Trade Administration, U.S. Department of Commerce (the "ITA" or the "Department" or "Commerce"): *Final Determination of Sales at Less than Fair Value: Polyethylene Terephthalate Film, Sheet, and Strip From the Republic of Korea,* 56 Fed. Reg. 16,305–16,317 (April 22, 1991); and *Amended Final Determination of Sales at Less than Fair Value: Polyethylene Terephthalate Film, Sheet, and Strip From the Republic of Korea,* 56 Fed. Reg. 25,669–25,670 (June 5, 1991).

Plaintiffs have jointly filed briefs on their behalf. Defendant-intervenors SKC Limited, SKC America, Inc., and Cheil Synthetics, Inc. have each filed briefs on their own behalf in opposition to plaintiffs' motions.

BACKGROUND[1]

On April 27, 1990, an antidumping petition was filed by E.I. DuPont de Nemours & Company, Inc. concerning imports of polyethylene terephthalate film, sheet, and strip. Polyethylene Terephthalate film, also known as PET film, is a clear flexible transparent material which is used for, among other things, magnetic recording media, laminations, transparencies, cable sheathing and food packaging. The manufacture of PET film for these purposes also results in the production of an inferior or "off-grade" that is used for other purposes including "shingle-release," an interleaved separator for roofing shingles.

The petition alleged, *inter alia,* that Korean manufacturers of PET film were selling PET film in the United States at less than fair value and were also selling PET film in their home market at below the cost of production. P.R. Document 1 at 29. On May 24, 1990, Commerce published a notice of its decision to initiate a less-than-fair value investigation of the subject PET film. *See* 55 Fed. Reg. 21,417. On November 30, 1990, Commerce preliminarily determined that sales of PET film from Korea were being made at less-than-fair value. P.R. Document 229; 55 Fed. Reg. 49,668. On April 22, 1991, the Department published its final determination of sales at less-than-fair value. P.R. Document 308; 56 Fed. Reg. 16,305. An amended final determination in the subject investigation was published on June 5, 1991. 56 Fed. Reg. 25,669. On June 5, 1991, the International Trade Commission ("ITC") reported that imports of PET film were causing material injury to the domestic industry. 56 Fed. Reg. 25,695. On June 5, 1991, Commerce issued an antidumping duty order covering imports of PET film from Korea. 56 Fed. Reg. 25,669. Plaintiffs now allege that the ITA erred in calculating the United States Price ("USP") and Foreign Market Value ("FMV") of PET film imported by defendant-intervenors SKC Limited, SKC America (collectively "SKC"), and Cheil Synthetics, Inc. ("Cheil"). As a result, plaintiffs argue, the final determinations understate the dumping margins for defendant-intervenors.

STANDARD OF REVIEW

In reviewing injury, antidumping, and countervailing duty investigations and determinations, this Court must hold unlawful any determination unsupported by substantial evidence on the record or otherwise not in accordance with law. 19 U.S.C. § 1516a(b)(1)(B) (1982). Substantial evidence "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 477 (1951) *(quoting Consolidated Edison Co. v. La-*

[1] The Court quotes without attribution the uncontroverted facts in the record. Citations to documents contained in the public record of this administration review are designated "P.R." Citations to documents contained in the confidential record of this administrative review are designated "C.R."

bor Board, 305 U.S. 197, 229 (1938)). "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 619–20 (1966); *See also, Matsushita Electric Industrial Co. v. United States,* 750 F.2d 927, 933 (Fed. Cir. 1984). The Court may not substitute its judgment for that of the agency when the choice is between two fairly conflicting views, even though the Court would justifiably have made a different choice had the matter been before it *de novo. See American Spring Wire Corp. v. United States,* 8 CIT 20, 22, 590 F. Supp. 1273, 1276 (1984) *(citing Universal Camera*, 340 U.S. at 488), *aff'd sub nom., Armco, Inc. v. United States,* 760 F.2d 249 (Fed. Cir. 1985).

Moreover, substantial evidence supporting an agency determination must be based on the whole record. *See Universal Camera Corp.*, 340 U.S. 474, 488 (1951). The "whole record" means that the Court must consider both sides of the record. It is not sufficient to examine merely the evidence that sustains the agency's conclusion. *Id.* In other words, it is not enough that the evidence supporting the agency decision is "substantial" when considered by itself. The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. *Universal Camera Corp.*, 340 U.S. at 478, 488.

The precise way in which courts review agency findings cannot be imprisoned within any form of words; new formulas attempting to rephrase the old are not likely to be more helpful than the old. There are no talismanic words that can avoid the process of judgment. *Universal Camera Corp.*, 340 U.S. at 489.

Discussion

1. *SKC's And Cheil's Duty Drawback Adjustment Claims:*

The Court first addresses plaintiffs' argument that the ITA improperly adjusted the USP for Korean drawback allowances for imported raw materials that were exported in finished film. Plaintiffs argue that the allocation of drawback allowances for raw materials was inconsistent with the allocation of costs for raw materials for the same products, and the drawback adjustment frequently exceeded the duties paid.

In response, the ITA points out that during verification, it was able to establish that both SKC and Cheil provided adequate evidence to satisfy the criteria enumerated under 19 U.S.C. § 1677a(d)(1)(B). Therefore, ITA argues that its determination to allow the duty drawback adjustments is supported by substantial evidence and is in accordance with law. Pursuant to 19 U.S.C. § 1677a(d)(1)(B):

> **(d) Adjustments to purchase price and exporter's sales price.** – The purchase price and the exporter's sales price shall be adjusted by being –
>
> (1) increased by –

> (B) the amount of any import duties imposed by the country of exportation which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States;

Accordingly, Commerce must increase USP by the amount of duties that Korea refunded to Cheil and SKC as a result of exportation of merchandise to the United States.

The drawback claim was based on average per pound amounts that apply to all types of film even though materials costs varied among film types. *Letter dated October 15, 1990 from Dow, Lohnes & Albertson,* C.R. Document 59, Reel 4, at Frame 104; *Letter dated October 19, 1990 from Akin, Gump, Strauss, Hauer & Feld,* C.R. Document 60, Reel 4, at Frames 142–49. Plaintiffs point out that the claimed duty drawback adjustments for SKC varied by [ ] *Marsh SKC COP/CV Memorandum,* C.R. Document 103, Reel 4, at Frames 1510–11, 1517–18; *See Computer Printout of SKC's U.S. Sales,* Reel 5 of 6. However, [ ] and the applicable Korean duty rate dropped from 15.5% *ad valorem* to 13.5% *ad valorem* on January 1, 1990. C.R. Document 59, Reel 4, at Frame 104; C.R. Document 60, Reel 4, at Frames 142–49. As a result, plaintiffs maintain, the duty drawback adjustment frequently [ ]

Plaintiffs provide an example of the alleged inconsistency in regard to Cheil with an example. [ ] Dividing the drawback amount by the duty rate gives the raw material amount upon which the duty was based. [ ]. Plaintiffs refer to these raw materials costs as "the substantial equivalent of the total cost of manufacturing," an "obvious problem." *Plaintiffs' Brief In Support For Judgment Upon The Agency Record,* at 21–22. Plaintiffs do not, however, indicate what proportion of total cost would typically be raw material cost.

In addition, plaintiffs point out that an ITA accountant who calculated raw material costs "as a check," came up with a figure for the XA–30–C film of [ ] *See Cheil COP/CV Memorandum, supra* note 8, Frame 1468. The [ ] Similarly, for the XV–30–C film, the ITA accountant calculated a cost of [ ] which would imply a duty drawback adjustment of [ ] *Id.* The ITA allowed a duty drawback adjustment for the XV–30–C film of [ ].

In the final determination, the ITA rejected plaintiffs arguments on this issue.

> Respondents were able to document claimed duty drawback amounts, as reported in the sales listing. We verified that respondents receive duty drawback for ingredients that are imported and then exported as PET film to the United States. We examined import and export permits, government allowable duty drawback rates, certificate lists of materials used, material usage rates, and duty drawback refund applications. Respondents tied duty draw-

> back to specific U.S. sales using import permits, export permits, duty drawback applications, and duty drawback refund certificates.

Final Determination: Polyethylene Terephthalate film; 56 Fed Reg. at 16,308–16,309.

An adjustment is appropriate so long as Commerce determines that import duties are actually paid and rebated, and there is a sufficient link between the cost to the manufacturer (i.e. import duties paid) and the claimed adjustment (rebate granted). *See Huffy Corp. v. United States,* 10 CIT 214, 216, 632 F. Supp. 50, 53 (1986). The ITA concluded at verification that this test had been satisfied.

The ITA also disagreed with plaintiffs' contention that the cost of materials used in assessing the cost of manufacturing PET film should correlate with the cost of materials claimed for duty drawback.

> For a variety of reasons, raw materials costs may not precisely correlate to drawback amounts. For example, changes in duty rates and product mix over time, sourcing of raw material inputs (domestic or imported), time lags between import of raw materials and export of finished merchandise, and fluctuating raw materials costs may all affect the calculation of costs and drawback amounts.

Final Determination: Polyethylene Terephthalate; 56 Fed. Reg. at 16,309. Thus, similarly to its position on duty rebates, the ITA contends that merely a sufficient rather than a perfect link is required.

Plaintiffs further argue that Cheil's drawback claim is overstated because a certain amount of material is used from domestic sources. The ITA determined that

> Petitioners have incorrectly concluded that the percentage of particular material inputs sourced domestically reflects the total percentage of materials sourced domestically. At verification, we examined the amount of input material sourced domestically and requested that respondent calculate the actual impact on Cheil's duty drawback claim. Based on this analysis, we concluded that the actual impact of the domestically sourced input on duty drawback is negligible.

Final Determination: Polyethylene Terephthalate; 56 Fed. Reg. at 16,314. At verification, the ITA found that Cheil purchases [ ] *Cheil Verification Report,* C.R. Document 83, Reel 4, at Frame 901. The record shows that the ITA reduced Cheil's drawback adjustment to account for the raw material purchased from domestic sources. Exhibit 5–11, at 619.

Plaintiffs argue that the ITA's conclusion that the impact of domestic material was negligible is erroneous [ ] the period of investigation of November 1989 to April 1990 from which the cost of production data was derived.

Plaintiffs make the same argument with respect to SKC. SKC stated in a letter that [ ] *Letter dated September 27, 1990 from Dow, Lohnes & Albertson,* C.R. Document 51, Reel 3, at Frame 2426. Plaintiffs argue that this is inconsistent with the fact that the ITA ac-

cepted drawback claims [ ] *See Computer Printout of SKC's U.S. Sales,* Reel 6 of 6, at 156–78.

The ITA responds that the agency investigated SKC's and Cheil's duty drawback claims by reviewing documents, provided by the companies, which traced the payment of import duties to the receipt of duty drawback payments.

In *Carlisle Tire & Rubber Co. v. United States,* ____ CIT ____, 657 F. Supp. 1287 (1987), the Court held that the language of 19 U.S.C. § 1677a(d)(1)(B) requires that

> In determining whether such an adjustment should be made, Commerce considers (1) whether the import duty and rebate are directly linked to, and dependent upon, one another; and (2) whether the company claiming the adjustment can show that there were sufficient imports of the imported raw materials to account for the drawback received on the exported product.

657 F. Supp. at 1289.

The ITA traced SKC's and Cheil's drawback claims by reviewing documents provided by both parties, and found a sufficient link between duties paid and drawback conferred. C.R. Document 83, at 25–27; C.R. Document 87, at 33–34. There was no indication that drawback payments ever exceeded the amount of duties initially paid. *Defendant's Memorandum In Opposition To Plaintiffs' Motion For Judgment Upon The Administrative Record,* at 23–24.

As for the fact that the respondents' rates of use and cost of imported raw materials changed during the period of investigation, the ITA points out that a substantial number of the duty drawback payments were for importations that occurred before the period of investigation and naturally would not reflect subsequent changes. *Defendant's Memorandum In Opposition,* at 25–26. Drawback substitution requires only that respondents imported sufficient raw materials to produce the amount of PET film they exported. The ITA verified that SKC and Cheil imported and paid duties on a kilogram of raw materials for every kilogram which they exported and upon which they received drawback. C.R. Document 83 at 25–27; C.R. Document 87 at 33–34.

The ITA admits that there are discrepancies between the cost of raw materials that were the bases of respondents' drawback claims and the cost of materials used in its cost of production analysis. However, the ITA argues that the discrepancies arise due to two reasons. First, the raw materials upon which duty drawbacks were granted were purchased earlier than the raw materials examined by it for the cost of production analysis. *Defendant's Memorandum In Opposition,* at 27. The duty drawbacks granted during the period of investigation were often for importations [ ]. *SKC Verification Exhibit 51, Cheil Verification Exhibit 5–12.* Further, the ITA argues that this time lag between the purchases examined by it in conducting the cost of production analysis and the purchases corresponding to the duty drawback payments caused the prices of these two sets of raw materials to diverge be-

cause changes in duty rates, product mixes, raw material sources, and prices may have taken place. *Final Determination: Polyethylene Terephthalate;* 56 Fed. Reg. at 16,309.

The ITA's second reason for the differences in raw materials costs is that Korea imposed import duties and, subsequently, granted duty drawbacks based upon a valuation method that is different from the valuation method which Commerce must use for analyzing cost of production. *Defendant's Memorandum In Opposition,* at 28. Korea's import duties upon PET film raw materials were based upon the import prices of the raw materials, plus a few minor adjustments. P.R. Document 120, Appendix C–10 (Korean Customs Act, Article 9); P.R. Document 173 at Appendix C–3. While Korean import duties are based on import prices of the materials, the ITA argues that under *Ipsco, Inc. v. United States,* 13 CIT 402, 714 F. Supp. 1211 (1989), it was required to use a different valuation for cost of production. However, as noted below, *Ipsco* was reversed after briefs in this case were filed, and the government now concedes that remand is appropriate in light of the reversal.

The evidence in the administrative record supports ITA's conclusion that both Cheil and SKC qualified for the adjustments under 19 U.S.C. § 1677a(d)(1)(B). The ITA was able to demonstrate that the duty drawback claimed was calculated on the basis of the dutiable value of imported material incorporated in the production of PET film which was exported to the United States. This determination is supported by documentation showing actual payments by both Cheil and SKC of import duties and amount of raw materials actually imported. Both Korean producers provided Commerce with evidence showing the quantity of raw materials actually incorporated into the exported PET film. Furthermore, the ITA tied duty drawback to specific U.S. sales based on a review and verification of import permits, export permits, duty drawback applications, and drawback refund certificates. In this case, the ITA determined that both Cheil and SKC were entitled to receive certain adjustments for drawback under the criteria set forth in 19 U.S.C. § 1677a(d)(1)(B). Essentially, the ITA examined the entire document trail to link the receipt of a duty drawback to the importation of the raw materials and the payment of import duties. Since there is sufficient evidence from which the ITA could reasonably draw the conclusion that both companies qualified for the adjustments under 19 U.S.C. § 1677a(d)(1)(B), that determination is supported by substantial evidence and in accordance with law.

2. *Value Added Tax Adjustment to United States Price:*

Plaintiffs next argue that the ITA improperly adjusted the USP for value-added taxes ("VAT") imposed on products sold in Korea but not on exports to the United States. Section 772(d)(1)(C) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1677a(d)(1)(C) (1988), directs that the USP be increased by the amount of taxes imposed in the country of exportation that have been rebated by reason of export, "but only to the

extent that such taxes are added to or included in the price of such or similar merchandise when sold in the country of exportation * * *." To determine the amount of the VAT adjustment, the ITA applied the Korean VAT rate to the gross sales prices to the first unrelated U.S. customer. *Final Determination: Polyethylene Terephthalate;* 56 Fed. Reg. at 16,309. The plaintiffs claim that the price to the first unrelated U.S. customer is the incorrect tax base for calculating the tax adjustment. *Plaintiffs' Brief,* at 30. Plaintiffs argue that this includes such items as U.S. selling expenses, duty, freight and insurance, which represent value added outside of Korea. Since those costs are not added to or included in the price of products sold in Korea, their inclusion violates the plain meaning of § 1677a(d)(1)(C). *Id.* at 30–31.

Plaintiffs assert that the VAT methodology adopted by the ITA not only increased USP beyond the level permitted by the statute, but also created an irreconcilable conflict between Commerce's VAT rebate adjustment and the statutory provisions that require the deduction from the USP of "the amount, if any, included in such price, attributable to any additional costs, charges, and expenses, and United States import duties, incident to bringing the merchandise from the place of shipment in the country of exportation to the place of delivery in the United States," as well as, "the amount, if any of * * * expenses generally incurred by or for the account of the exporter in the United States in selling * * * [the] merchandise." *See* 19 §§ 1677a(d)(2)(A) and 1677a(e)(2). They argue that if the USP is increased by a VAT rebate adjustment on these items, then the full VAT-inflated amounts must be deducted from the USP under the latter sections. *Plaintiffs' Brief,* at 31.

In addition, plaintiffs argue that Korea's VAT applies a zero rate to export sales, services furnished outside of Korea and international transport services. Aside from the fact that home market sales would not include expenses for ocean freight, marine insurance, U.S. duty and U.S. selling expenses, these items would be subject to a zero rate even if the goods themselves were taxable. Thus, if these items were taxable, rational businessmen would always buy f.o.b. port of export. *Id.* at 34. Moreover, the ITA itself has calculated the VAT adjustment based on a USP net of all charges that would not have been incurred had the product been sold in the home market. *Id,* at 36, *citing Industrial Nitrocellulose from the Federal Republic of Germany,* 55 Fed. Reg. 21,058 (Final) (May 22, 1990).

The ITA responds that it seeks to use a tax base most similar to that used in Korea for the calculation of VAT. Since the domestic tax base is the gross delivered price to the first unrelated Korean customer, the ITA argues that the gross delivered price to the first unrelated U.S. customer is the proper tax base for the VAT adjustment. *Defendant's Memorandum In Opposition,* at 32.

The method the ITA used, the government continues, is consistent with the adjustments for shipping to the United States required by 19 U.S.C. § 1677a. Using a tax base to calculate the USP tax adjustment

that is the most similar to the exporting country's tax base is also required by the general principle underlying the antidumping law; the ITA asserts that it is well-established that a primary goal of the antidumping statute is for Commerce to make comparisons on a fair or "apples to apples" basis. *Id.* at 31. The ITA states that if plaintiffs' argument is accepted, both the USP tax adjustment and the amount of VAT included in FMV would have to be recalculated using the ex-factory price as a tax base. By way of circular reasoning, the ITA concludes that this is not consistent with using the same tax base as Korea, the price to the first unrelated party. Thus, the ITA is faced with the dilemma of violating one the country's statutes by choosing either of the above discussed methodological alternatives.

In addition, the ITA argues, no language in the relevant statutes requires what plaintiffs seeks. *Id.* at 33–34. Plaintiffs' citations of administrative reviews from other countries are not relevant, because the proper method of tax adjustment varies with the tax laws of the country. *Id.* at 34–35. For example, plaintiffs rely upon Commerce's tax adjustment method in *Industrial Nitrocellulose from the Federal Republic of Germany, supra,* to support its claim. The ITA argues that this reliance is misplaced because in that case Commerce was required to follow the Federal Republic of Germany's tax laws and, possibly its terms of domestic sales. The ITA further argues that if a VAT is applied, the exporting country's terms of domestic sales may also affect Commerce's calculation of the USP tax adjustment. The proper method for calculating the USP tax adjustment, therefore, may differ from country to country and even between different types of taxes within a country. *Id.* at 34.

One of the goals of the antidumping statute is to guarantee that the administering authority makes the fair value comparison on a fair basis – the so-called apples to apples comparison. *Smith-Corona Group v. United States,* 713 F.2d 1568, 1578 (Fed. Cir. 1983), *cert. denied,* 465 U.S. 1022 (1984). In *Zenith Electronics Corp. v. United States,* 988 F.2d 1573, 1580 (Fed. Cir. 1993), *reh'g en banc, denied, Zenith Electronics Corp. v. United States,* 1993 U.S. App. LEXIS 10,358 (Fed. Cir. Apr. 1993), the court stated that "[t]itle 19 explicitly requires Commerce to increase USP by the amount of tax that the exporting country *would have assessed on the merchandise if it had been sold in the home market.*" (emphasis added). It is clear from this statement, as well as the explicit language of the statute itself, that the sales price to which the VAT rate is to be applied is the USP calculated at the same point in the chain of commerce as where the Korean tax authorities apply the Korean VAT to home market sales. For example, if when taxing home market sales, the Korean tax authorities apply the Korean VAT rate to gross sales price to calculate the amount of tax due, the ITA is required to apply the Korean VAT rate to U.S. gross sales price and add the resulting amount to USP. See 19 U.S.C. § 1677a(d)(1)(C).

Support for this position is provided by the Court of Appeals for the Federal Circuit's recent decision on the tax base issue in *Daewoo Elec-*

tronics. Co. v. United States, Nos. 92–1558, –1559, –1560, –1561, –1562 (Fed. Cir. Sept. 30, 1993). The court in *Daewoo* interpreted section 1677a(d)(1)(C) as follows:

> *mandates a calculation of imputed tax amounts to be added to the USP, but does not specify to which USP the Korean taxes are to be applied as the product moves to the consumer.* This determination is important because the Korean taxes are not a specific amount, but instead *ad valorem* in nature; and it is difficult because the question is a hypothetical. *The Korean taxes must be applied to sales of goods at some discrete moment in the stream of commerce or in the United States, a different market from that in which the taxes should be levied, but are not, because of exportation.*

Daewoo, Nos. 92–1558, –1559, –1560, –1561, –1562 at 18–19 (emphasis added).

In *Daewoo,* the ITA determined that evidence on the administrative record showed that the Korean tax authorities applied their *ad valorem* taxes to "the net price of the delivered televisions receivers to unrelated dealers." Therefore, the ITA applied the Korean tax rate to the comparable USP, *i.e.* the price to the first unrelated purchaser. The court affirmed the ITA's methodology determining: 1) where in the stream of commerce the Korean authorities applied the *ad valorem* tax rate in the home market; 2) applying the same tax rate to USP calculated at the same point in the chain of commerce; and 3) adding this amount to USP. *Daewoo,* at 18–22. *See also, Federal-Mogul Corporation v. United States,* ____ CIT ____, Slip Op. 93–194, pages 12–14 (Oct. 7, 1993).

Given the evidence, and the recent decision issued by the Federal Circuit, this Court cannot agree with plaintiffs that the ITA erred in selecting the analogous point for the tax base in the United States. Substantial evidence supports the ITA's choice, and that is all the statute requires. ITA's determination of the price to the first unrelated U.S. customer as the appropriate tax base is reasonable and is in accordance with law.

The ITA also argues that even if it incorrectly selected a tax base for the USP tax adjustment, any effect upon the antidumping margins was negated by its tax related circumstances-of-sale adjustment to FMV, *i.e.* 19 U.S.C. § 1677b(a)(4)(B). *Defendant's Memorandum In Opposition,* at 35. According to the ITA, such an adjustment was necessary because it calculated the amount of VAT forgiven upon USP (which is different than the Korean home market price). As a result, the imputed tax added to USP was different than the amount of VAT added to foreign market value. The ITA states that the circumstances-of-sale adjustment negates the effect of this difference in the amount of the tax by subtracting from FMV the difference between the tax charged on the home market sale and the tax adjustment added to the U.S. sale. *Id.* at 35–36.

Section 1677a(d)(1)(C), the section dealing with tax adjustments, does not provide for any adjustment to FMV to correct for tax-related distortion of the dumping margin. *See Zenith Electronics Corporation v. United States,* 988 F.2d 1573, (Fed. Cir. 1993) *(Zenith II).* As the court

noted in *Zenith II (quoting Zenith Electronics Corporation v. United States,* 10 CIT 268, 276, 633 F. Supp. 1382, 1389–1390, (1986) *(Zenith I)),* the sole provision of title 19 expressly addressing adjustment for home market taxes does not allow adjustments to FMV, only to USP. Thus, the language of title 19 provides specifically for tax adjustments to USP. *Zenith II,* at 1580. Moreover, the specific provision of title 19 for tax adjustments does not permit changes to FMV.

The court in *Zenith II,* found that the legislative history of the Antidumping Act confirms that adjustments to USP are the sole statutory allowance for forgiven taxes. During the process leading to enactment of the Act, the House of Representatives approved a provision which defined FMV to exclude excise taxes levied in the home market. *See* 61 Cong. Rec. 254 (1921). The Senate rejected the House definition and instead defined FMV to include these taxes. *See* S. Rep. No. 16, 67th Cong., 1st Sess. 2–3 (1921). The Senate's provision, however, allowed upward adjustment of USP to prevent a dumping margin from arising solely due to a foreign government's forgiveness of taxes on exports. *See* S. Rep. No. 16 at 2, 12. Subsequently, the House-Senate Conference Committee responsible for reconciling the bills from the separate houses of Congress adopted the Senate provision and this version became law. The Antidumping Act, ch. 14 §§ 203, 204, 42 Stat. 9, 12–13 (1921) (codified at 19 U.S.C. §§ 1677a(d)(1)(C), 1677b (1988)). This Court therefore concludes that Congress specifically rejected accounting for VAT taxes in FMV, opting instead to adjust USP.

Similarly, the language and context of the general circumstances-of-sale provision, *i.e.* 19 U.S.C. § 1677b(a)(4)(B), do not permit that section to override the express language of 19 U.S.C. § 1677a(d)(1)(C) for tax adjustments. The ITA made a circumstances-of-sale adjustment to negate any difference between Korean VAT and the VAT tax adjustment. However, the circumstances-of-sale provision contains no reference to taxes and therefore, neither the Court or the agency is empowered to apply one. In addition, ITA's application of the circumstances-of-sale provision, to adjust FMV for VAT taxes nullifies the USP-adjusting operation of section 1677a(d)(1)(C). The ITA improperly interpreted the general circumstances-of-sale language to allow it to write the specific tax adjustment section out of the statute.

19 U.S.C. § 1677b(a)(4)(B) only permits adjustments to FMV to accommodate "differences in circumstances-of-sale." *Zenith II,* at 1581. Yet the ITA has applied section 1677b(a)(4)(B) essentially to correct for the multiplier effect. The multiplier effect is a dumping margin variance caused by operation of the antidumping laws, not by a difference in the circumstances-of-sale.[2] By engaging in dumping, Cheil and SKC are re-

[2] The multiplier effect can be seen in the following example taken from *Zenith Electronics Corp. v. United States,* 10 CIT 268, 273 n.9, 633 F. Supp. 1382, 1386 n.9 (1986), *appeal dismissed,* 875 F.2d 291 (Fed. Cir. 1989):

> Suppose the pre-tax home market price for a certain model of Japanese television is equal to $100, while the purchase price for the same model when sold for export to the United States is $90. In this tax-free comparison, the absolute margin of dumping would be $10 ($100–$90) and the *ad valorem* margin would be 11.1% ($10/$90).

continued:

sponsible for the multiplier effect. The multiplier effect does not create a dumping margin where one does not exist. Only when pre-tax FMV exceeds USP and a foreign nation assesses an *ad valorem* commodity tax does section 1677a(d)(1)(C) operate to accentuate the dumping margin. *Id.*

As the Supreme Court emphasized in *Board of Governors v. Dimension Financial Corporation,* 474 U.S. 361:

> The "plain purpose" of legislation * * * is determined in the first instance with reference to the plain language of the statute itself * * *. Application of "broad purposes" of legislation at the expense of specific provisions ignores the complexity of the problems Congress is called upon to address and the dynamics of legislative action.

Board of Governors, at 373–374.

"The methodology plainly commanded by 19 U.S.C. § 1677a(d)(1)(C) embodies the degree of tax neutrality Congress sought to implement and may not be disregarded by the ITA on the ground that some other method would produce a 'fairer' comparison, *see id.; Aaron v. SEC,* 446 U.S. 680, 695 (1980), or would be more 'reasonable' or 'efficient'. *See United States v. H. Rosenthal Co.,* 609 F.2d 999, 1001–02 (CCPA 1979). Only Congress, not Commerce, may effect such a revision." *Zenith Electronics Corporation v. United States,* 10 CIT 268, 280, 633 F. Supp. 1382, 1392, (1986) *(Zenith I).*

In sum, the ITA applied the tax adjustment provision to remedy the tax-related differences between the home market and export sales. Subsequently, the ITA applied the circumstances-of-sale provision of the statute to correct the operation of the antidumping laws. The language of title 19 does not support this second step. ITA did not employ section 1677b(a)(4)(B) to remedy a dumping margin variance caused by a circumstances-of-sale, but a variance caused by operation of the trade laws.

Moreover, nothing in the enactment history of the circumstances-of-sale provision permits it to trump the express and specific statutory language covering tax adjustments. Rather, both the language and legislative history of this general provision provide Commerce with authority to adjust FMV for differences in circumstances-of-sale not specifically covered by other sections of title 19. *Id.* The Senate and House reports accompanying the 1958 circumstances-of-sale provision of the statute list only "differences in the terms of sale, credit terms, and advertising and selling costs" as circumstances warranting adjustments under the provision. S. Rep. No. 1619, 85th Cong., 2d Sess. 7 (1957).

Since the Japanese commodity tax is 15%, the tax on the home market sale equals $15 (15% of $100). If we assume that this tax is fully shifted forward to the home market purchaser, then the after-tax home market price equals $115. By contrast, the amount of tax rebated or not collected on the exported television because it was sold for export would equal only $13.50 (15% of 90). Hence, if the United States price were increased by this latter amount, in accordance with the terms of 19 U.S.C. § 1677a(d)(1)(C), the adjusted calculation of USP would be $103.50 ($90+$13.50). The absolute margin, determined by subtracting the adjusted USP from the after-tax home market price, would be $11.50 ($115–$103.50), an amount greater than the $10 absolute margin calculated in the tax-free comparison, above. The *ad valorem* margin, however, would be identical, at 11.1% ($11.50/$103.50).

None of these items are covered by another section of the antidumping laws.

The Court holds that the circumstances-of-sale adjustment does not encompass adjustments for VAT specifically covered by section 1677a(d)(1)(C). Indeed, if this Court permits Commerce to use the circumstances-of-sale provision to account for forgiven value-added taxes, then section 1677a(d)(1)(C) would become completely superfluous. Accordingly, the Court remands this issue in order that the ITA recalculate the VAT adjustments in accord with section 1677a(d)(1)(C), not the general language of section 1677b(a)(4)(B). The general circumstances-of-sale provision of the statute, *i.e.* 1677b(a)(4)(B), does not govern when the trade laws expressly provide a more specific treatment for foreign taxes.

3. *Commerce's Determination that Cheil is Related to Samsung and Samsung America:*

Plaintiffs argue that the ITA improperly concluded that Cheil was related to Samsung Co., Ltd. in Korea (an exporter of Cheil film) and Samsung America in the United States (an importer of Cheil film) and consequently calculated the USP for Cheil's products based on sales by Samsung America. The applicable provision states:

> (13) **Exporter.**—For the purpose of determining United States price, the term "exporter" includes the person by whom or for whose account the merchandise is imported into the United States if—
>
> (B) such person[importer] owns or controls, directly or indirectly, through stock ownership or control or otherwise, any interest in the business of the exporter, manufacturer, or producer;

19 U.S.C. § 1677(13)(B)(emphasis added)[3].

The ITA found that "the three entities are related in terms of common stock ownership, shared directors, and common management." *Plaintiffs' Brief,* at 37, *citing Final Determination: Polyethylene Terephthalate;* 56 Fed. Reg. at 16,314 (Comment 20). Because of the alleged relationship, the ITA determined that the price from Cheil to Samsung could not be used as the purchase price. Instead, USP for sales through Samsung America was calculated by using the prices charged by Samsung America to "unrelated" U.S. customers. Plaintiffs assert that the only evidence in the record supporting the ITA's finding consists of the following:

> Cheil states that it is a member of the Samsung Group, a group of related companies under common management control. P.R. Document 90 at 4.
>
> Samsung [ ] C.R. Document 83 at 3.
>
> Samsung and Cheil share [ ]. C.R. Document 83 at 3.

[3] Commerce may also determine that a manufacturer and an importer are related pursuant to subsections (A), (C) or (D) of section 1677(13).

Cheil asserts that [ ]. C.R. Document 83 at 4.
Cheil alleges that the [ ]. C.R. Document 83 at 4.

Plaintiffs argue that this evidence does not support the conclusion that the importer, Samsung America, "owns or controls, directly or indirectly, through stock ownership or control or otherwise, any interest in the business of the exporter, manufacturer, or producer." 19 U.S.C. § 1677(13)(B) (authorizing use of importer prices). Rather, only evidence of "actual financial linkage" may properly be considered. *Plaintiffs' Brief,* at 37–42.

Plaintiffs cite a number of determinations in which the ITA has found companies not to be related for antidumping law purposes despite similar relationships resembling those within the Samsung Group. *See Cellular Mobile Telephone and Subassemblies from Japan,* 54 Fed. Reg. 48,011 (Nov. 20, 1989) (not related under antidumping law despite being members of "the powerful Mitsubishi Group.") The ITA responds that the same findings listed by plaintiffs are sufficient to find that Samsung "owns or controls * * * any interest in the business" of Cheil. The ITA is not constrained to examine only financial relationships in making the determination. Determinations cited by plaintiffs, such as *Cellular Mobile Telephones and Subassemblies from Japan,* in which the ITA declined to find that two members of a Japanese *Keiretsu* were related, merely stand for the proposition that the ITA is not required to examine a non-financial relationship to determine relatedness. They do not imply that the ITA cannot examine non-financial relationships. *Defendant's Memorandum In Opposition,* at 41.

The ITA quotes *Zenith v. United States,* 9 CIT 110, 114, 606 F. Supp. 695, 700 (1985), *aff'd Zenith v. United States,* 783 F.2d 184 (1986), in further support of its position: "the discernment of relationships which do not find expression in concrete financial terms is not something which can be posited as a mandatory duty, and is not required of the ITA by law." Because the *Zenith* Court did not *require* the above-noted methodology, its permissibility was implicitly condoned according to Commerce.

The Court finds the ITA's determination that Cheil is related to Samsung and Samsung America was reasonable. The requirements of U.S. law were satisfied when the ITA investigated both financial and/or non-financial connections. The ITA properly considered and balanced those relationships which the law details in 19 U.S.C. § 1677(13)(B). Moreover, in view of the consideration listed by plaintiffs themselves, the ITA's determination on the question of relationship was supported by substantial evidence and was in accordance with law. Plaintiffs have failed to demonstrate a standard of practice from which Commerce has deviated.

4. *Commerce's Determination that Cheil's USP Sales Constitute Purchase Price Transactions:*

In the alternative, plaintiffs argue that if the ITA's conclusion that Cheil was related to its importers was correct, then the ITA erred in

treating the sales by Cheil's importers as "purchase price" rather than "exporter's sales price" transactions. *Plaintiffs' Brief,* at 44. Pursuant to 19 U.S.C. § 1677a(a), the "USP" of imported merchandise is to be calculated using either the purchase price or the exporter's sales price of the merchandise, depending upon the specific facts regarding the sale. "[T]he term 'purchase price' means the price at which merchandise is purchased or agreed to be purchased prior to the date of importation, from a reseller or the manufacturer or producer of the merchandise for exportation to the United States * * *." 19 U.S.C. 1677a(b). "[T]he term 'exporter's sale price' means the price at which merchandise is sold or agreed to be sold in the United States, before or after the time of importation, by or for the account of the exporter * * *." 19 U.S.C. § 1677a(c). The antidumping law attempts to construct value on the basis of arm's length transactions. The arm's length sale takes place at different points in the chain of commerce depending on whether the goods traveled through a related importer or through an independent, unrelated importer. Thus different methods of computation of USP are required depending on the relationship of the importer to the foreign producer. *Smith-Corona Group v. United States,* ___ Fed. Cir. (T) ___, ___, 713 F.2d 1568, 1572 (1983). "Where the importer is related, an arm's length transaction does not occur until the goods are resold to a retailer or to the public. In that case, 'exporter's sales price' is used." *Id.*

Plaintiffs state that the ITA determined that Cheil's sales should be treated as purchase price transactions "because all sales were made directly to unrelated parties prior to importation into the United States." *Final Determination: Polyethylene Terephthalate;* 56 Fed. Reg. at 16,306. Yet, plaintiffs argue, this Court has held that the determination of whether to use exporter's sales price or purchase price in such situations cannot be based solely on the timing of the sales. *PQ Corp. v. United States*, 11 CIT 53, 60, 652 F. Supp. 724, 731 (1987). Additional facts to be evaluated include whether the merchandise was shipped directly without being inventoried by the selling agent, whether this was a customary channel for sales, and whether the related selling agent acted only as a processor of documentation and a communication link. *Plaintiffs' Brief,* at 46.

Plaintiffs argue Samsung and Cheil do not meet this test, because Samsung is intimately involved in all aspects of Cheil's U.S. sales, leaving only a minor role to Cheil. *See Id.* at 47. Customers send purchase orders directly to Samsung America. *Verification Exhibit 5–1,* Reel 8, Frame 363. Samsung America sends a sales invoice directly to the customer. *Id.* at Frame 365. Samsung America is invoiced directly and pays the shipping company for miscellaneous shipping fees and inland freight. *Id.* at Frames 366 and 367. Samsung America is the importer of record of PET film. *Id.* at Frame 372. Samsung incurs warehouse fees on some sales, and receives payment from the customer. *Verification Exhibit 5–10,* Reel 8, Frame 589, *Verification Exhibit 5–1,* Reel 8, Frame 373. Samsung America sells PET film in the U.S. at a substantial mark-

up over the price at which it was purchased for export in Korea by Samsung. *Verification Exhibit 5–1*, Reel 8, Frame 390. Other substantial aspects of Samsung's involvement in Cheil's U.S. sales are detailed in *Plaintiffs' Confidential Brief*, at 48–49. In contrast, plaintiffs argue that Cheil performed only administrative and procedural functions of packing the film, obtaining export permits, claiming drawback and arranging Korean transportation. Cheil may be able to decline to sell at a particular price, but there is no evidence that Samsung communicated with Cheil before accepting an order. *Id.* at 50–51.

The ITA agrees that sales to a related importer in the United States are usually exporter's sales price transactions. However, the ITA notes that when a sale to a related importer meets the additional criteria listed by plaintiffs (merchandise not inventoried by importer, direct shipment was a customary channel for this customer, and related agent acted only as a processor of documentation), it will be treated as a purchase price transaction. Plaintiffs do not dispute the fact that Cheil's United States sales were made before the PET film was imported in the United States. The ITA argues that Cheil was greatly involved in the PET film sales at issue. Cheil negotiated price and basic sales terms directly with each U.S. customer and for each U.S. sale. P.R. Document 269 at 10; P.R. Document 90 at 11. These prices automatically included [ ] C.R. Document 83 at 11. After prices and sales terms were negotiated, a customer would send a purchase order to Samsung America which then forwarded the order to Cheil. P.R. Document 90 at 11. However, only Cheil could accept or reject an order. *Id.* Cheil also assumed the commercial risks that accompanied its U.S. sales [ ] C.R. Document 83 at 25. The ITA found that neither Samsung or Samsung America could accept or reject an order, nor did they have the authority to set the U.S. customer's price. Lastly, PET film was usually shipped directly from Cheil to the U.S. customer without entering the inventory of Samsung or Samsung America.[4] *Defendant's Memorandum In Opposition*, at 46.

The ITA distinguishes *PQ Corp.* because the Court in that case found no evidence of direct contacts or agreements between the producer and ultimate purchaser of the merchandise. Further, the importer in *PQ Corp.* established the terms of sale independently from the producer, unlike the present case. Therefore, according to the ITA, the application of the *PQ Corp.* standard actually supports its present determination.

The evidence presented in the administrative record indicates that Samsung and Samsung America acted as mere conduits, or sales agents, for direct sales of merchandise from Cheil to the unrelated U.S. purchaser. The record shows that Cheil entered into agreements directly with the unrelated U.S. purchaser. In addition, there is no indication in

[4] The record indicates that an exception to this general rule occurred when [ ] C.R. Document 83 at 24. Commerce has held that if a related importer must warehouse a shipment to meet the needs of a specific customer then the merchandise does not enter the importer's inventory. Cellular Mobile Telephones and Subassemblies from Japan; Preliminary Results of Antidumping Duty Administrative Review, 54 Fed. Reg. 48,922, 48,922 (Nov. 28, 1989).

the record that Samsung or Samsung America was involved in actually setting or approving Cheil U.S.'s sales price to the unrelated U.S. purchaser.

For these sales, the Court affirms the ITA's determination that purchase price is the appropriate basis for U.S. price based on the following elements: 1) The PET film in question was not usually introduced into the inventory of Samsung or Samsung America; 2) The fact that the vast majority of Cheil's U.S. PET film shipments were not warehoused by Samsung or Samsung America indicates that direct shipments of PET film from Cheil to U.S. customers were a customary commercial channel of sales; and 3) Samsung or Samsung America acted as only a processor of sales-related documentation and as a communication link with Cheil.

In light of these circumstances, the Court regards the routine selling functions of Cheil as merely having been relocated geographically from the country of exportation to the U.S., where Samsung and Samsung America performs them. Whether these functions take place in the U.S. or abroad does not change the substance of the transactions or the functions themselves. The Court therefore finds that the ITA's decision to consider Cheil's U.S. sales through Samsung and Samsung America as purchase price transactions was reasonable.

5. *Commerce's Deduction of SKC's Home Market Indirect Selling Expenses From SKC's FMV Up To The Amount Of SKC's U.S. Sales Commission Expenses:*

Plaintiffs challenge the ITA's implementation of 19 C.F.R. § 353.56(b) (1991) which sets out a special rule allowing an adjustment to FMV when a respondent pays sales commissions on sales in the United States but pays no commissions on sales in the home market. Essentially, plaintiffs argue that the ITA improperly reduced SKC's FMV by deducting home market indirect selling expenses up to the amount of U.S. commissions reported, despite the lack of any comparison between them. 19 C.F.R. § 353.56(b)(1) provides in part,

> The Secretary normally will make a reasonable allowance for other selling expenses if the Secretary makes a reasonable allowance for commissions in one of the markets under consideration and no commission is paid in the other market under consideration, but the Secretary will limit the amount of such allowance to the amount of other selling expenses incurred in the other market or the commissions allowed in the other market, whichever is less.

Plaintiffs contend there is no evidence in the record to show that the commissions in question were in any way a substitute for indirect selling expenses that would otherwise have been incurred by SKC. In this case, the ITA verified that SKC incurred sales commission expenses on [ ] purchase price sales in the United States, C.R. Document 87 at 32, and that SKC incurred indirect selling expenses from home market sales. *Id.* at 25. SKC incurred no sales commission expenses from Korean sales. As a result, in accordance with 19 C.F.R. § 353.56(b)(1), the ITA "allowed an offset [SKC's FMV] amounting to

the lesser of the weighted-average home market indirect selling expenses, or the U.S. commissions." *Final Determination: Polyethylene Terephthalate;* 56 Fed. Reg. at 16,307.

In the final determination, the ITA stated that the purpose of the commission offset is to adjust for indirect selling expenses incurred in lieu of payments to a commissionaire who would incur similar expenses, and that there is no requirement that the indirect expenses be comparable to the commissions. *Final Determination: Polyethylene Terephthalate;* 56 Fed. Reg. at 16,310 (Comment 7). Plaintiffs insist that the ITA does not fulfill its statutory mandate to calculate FMV by merely assuming there is no requirement that the indirect expenses be comparable to the commissions. Plaintiffs claim that the ITA standard of maintaining that the expenses are "similar" but not "comparable", is contradictory by its own terms. *Plaintiffs' Brief* at 57.

The ITA responds that the plaintiffs' argument is contrary to administrative practice and 19 C.F.R. § 353.56(b)(1). Indeed, the ITA has previously found that one market's indirect selling expenses do not have to be comparable to the sales commission expenses of the other market for Commerce to offset the indirect selling expenses. *Titanium Sponge from Japan; Final Results of Antidumping Duty Administrative Review,* 52 Fed. Reg. 4,797, 4,799 (Feb. 17, 1987).

The Court finds that there is no basis in the statute or the regulations for requiring the ITA to determine if the indirect selling expenses incurred in one market are "comparable" to the sales commissions expenses incurred in another market before it may make an adjustment under 19 C.F.R. § 353.56(b)(1). In addition, it has been the ITA's consistent practice to treat the offset for sales commissions in only one market in the manner it has in this case. *See, e.g., Final Results of Anti-dumping Duty Administrative Review and Revocation in Part: Titanium Sponge from Japan,* 57 Fed. Reg. 557, 558 (1992); *Final Results of Antidumping Duty Administrative Review; Certain Fresh Cut Flowers from Mexico,* 56 Fed. Reg. 1,794, 1,796–97 (1991); *Final Determination of Sales at Less Than fair Value; Industrial Nitrocellulose from the United Kingdom,* 55 Fed. Reg. 21,055, 21,056 (1990). Moreover, plaintiffs make no reference to the administrative record to show that antidumping margins were artificially lowered due to ITA's treatment of commission offset for U.S. sales commissions.

In the absence of explicit statutory guidance, the ITA's interpretation of the statute is given deference under the traditional *Chevron* standard of review. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837, 844–845 (1984). The ITA verified that there were selling expenses to offset against commissions paid in the U.S. market. Therefore, the Court cannot hold that the ITA's decision was unreasonable or otherwise not in accordance with law. The Court affirms the ITA's adjustment to FMV for U.S. sales commissions paid on ESP sales.

6. *Commerce's Decision To Accept SKC's Product Specific Cost Accounting Methodology:*

Plaintiffs argue that the ITA improperly calculated SKC product-specific production costs by relying on data that was not a part of SKC's normal accounting and therefore arbitrarily allocated costs among different products. SKC's normal accounting system records a single uniform cost for all PET film, representing the average cost of production for a given period. *Plaintiffs' Brief,* at 59. Product-specific costs are not calculated for either cost accounting purposes or for inventory purposes. When film is removed from inventory *i.e.* for sale, a uniform cost is also used, regardless of film type. *See Report on Cost of Production and Constructed Value Verification of SKC Limited,* March 19, 1991 at 13–14, C.R. Document 100, Reel 4, Frames 1349–50. SKC described this system as being in accord with Korean GAAP, and the ITA made no contrary finding. *See Questionnaire Response of SKC Limited and SKC America, Inc.,* Section A, July 10, 1990, Appendix A–11 at 1, C.R. Document 19, Reel 3, Frame 605. For purposes of this investigation, SKC used a different method to construct product specific costs. Despite "a legion" of potential errors identified by the ITA, the ITA accepted this method. *Plaintiffs' Brief* at 59–60; C.R. Document 100, Reel 4, Frames 1337–38. Plaintiffs assert that this reliance on the different method conflicts with the ITA's longstanding policy of using the actual costs recorded in a respondent's books if the books are kept in accordance with local GAAP. *See Camargo Corrêa Metais, S.A. v. United States,* ____ CIT ____, Slip Op. 93–163, at 3, (August 13, 1993).

Plaintiffs allege that none of the data used in the hypothetical cost accounting can be traced to a record that is part of the company's accounting system or is subject to an external audit. For example, an important figure, the usage rate for virgin PET chips, is based on production slips that are not a normal part of SKC's accounting system. As an alternative, plaintiffs argue that the cost of production should be based on SKC's average film value records, because the key costs of producing film are the same regardless of the film type. Each pound of film contains the same basic ingredients. *Plaintiffs' Brief,* at 63.

The ITA responds that SKC informed the ITA that it did not keep product specific costs records, but that such figures could be derived using a standard PET film chip usage rate for each type of film. The rate was calculated by determining the length of time spent extruding a particular film and multiplying that figure by the rate at which the polymer was extruded. From this, SKC determined the total volume extruded during each run, and thus the amount of chips used. The ITA verified the reliability and accuracy of this method by tracing the figures back to the daily "winder production slips" (explained in detail in *Defendant's Memorandum In Opposition,* at 56–57) used in the calculation, and SKC's raw material ledger. C.R. Document 100 at 15, 16, 21–23, *SKC Cost Verification Exhibits* 4, 16–18, and 31. Comparing costs, the ITA

found that the results conformed with SKC's regularly kept business records.

In addition, the ITA argues it was required to accept SKC's product specific accounting methods under *Ipsco, Inc. v. United States,* 13 CIT 402, 714 F. Supp. 1211 (1989). *Defendant's Memorandum In Opposition,* at 54. As noted below, *Ipsco* was subsequently reversed. In a letter submitted to the Court after briefs were filed, the government conceded the necessity of revisiting the issues for which it relied heavily on *Ipsco.* In light of the development, the Court remands this issue with instruction that the ITA comment on the effect of *Ipsco's* reversal upon its choice of accounting methodology discussed above.

7. *The Methodology Used by Commerce To Allocate SKC's And Cheil's Production Costs Between Off-Grade And PET Film:*

In its investigation, Commerce determined that both Cheil and SKC sold some products, including off-grade film, in the home market at prices below the cost of production. *See Final Determination: Polyethylene Terephthalate;* 56 Fed. Reg. 16,307, 16,308. In its final determination, the ITA calculated the cost associated with Cheil's and SKC's production of certain off grade film by taking the average per kilogram cost of PET film production for each company during the period of investigation and then allocating costs between prime grade and off-grade products on the basis of their relative selling prices. 56 Fed. Reg. at 16,311–12, 16,315–16. Commerce justified its decision by reference to a similar value-based cost allocation methodology accepted by this Court in *Ipsco, Inc. v. United States,* 13 CIT 402, 714 F. Supp. 1211 (1989).

The Plaintiffs argue that the ITA's decision to follow the methodology is flawed in several respects. First, despite the heavy reliance placed on *Ipsco* by respondents from the outset of the investigation, neither respondents nor Commerce developed an adequate factual basis for invoking *Ipsco. Plaintiffs' Brief,* at 66–67. Second, even if a factual record existed to support resort to value-based cost allocations, the approach used in the contested determination is contrary to the purpose of the statute and to *Ipsco.* Finally, the underlying defects in the cost data accepted by the ITA are so severe that even if *Ipsco* could be properly invoked, the results reached by it in this investigation would still be flawed. *Id.*

Both plaintiffs and the ITA have made extensive arguments concerning the calculation of the cost of off-grade films based on *Ipsco, Inc. v. United States,* 13 CIT 402, 714 F. Supp. 1211 (1989), *reversed,* 965 F.2d 1056 (June 3, 1992). *Ipsco* was reversed after briefs in this case were submitted. In a letter to the Court dated September 8, 1992, the government concedes that "a remand is appropriate solely for the purpose of revisiting Commerce's choice of methodology for calculating the production costs incurred by SKC and Cheil in producing off-grade finished PET films." Accordingly, this issue is remanded for consideration by Commerce in light of the reversal of *Ipsco.*

8. *Commerce's Decision To Accept Cheil's Method of Accounting For Recycled Scrap Film:*

Both Cheil and SKC recycle scrap film created by the production of the PET film. The film is crushed and compacted into "pellets" which are then added together with "virgin" pellets in different combinations to produce different types of PET film. During the ITA's cost of production investigation, Cheil stated that its cost accounting methodology for the calculation of recycled scrap film costs relied upon the recycled scrap film's "net realized value." In the final determination, the ITA agreed to accept Cheil's material costs for recycled scrap film because the costs "recognized the market value of the scrap film pellets, as well as their influence on the value of the finished PET film." *Final Determination: Polyethylene Terephthalate;* 56 Fed. Reg. at 16,316.

Plaintiffs argue that the ITA should have rejected Cheil's material costs for recycled scrap film because net realizable value methodology is prohibited by *Ipsco.* Specifically, if net realizable value is used to determine the cost of PET film materials, then it has a direct effect on the costing of inputs that are a critical element of cost of production and constructed value, and should thus be viewed as improper under the Court's analysis in *Ipsco.* Plaintiffs' argument concerns the calculation of the cost of recycled scrap film based upon *Ipsco.* Accordingly, Commerce's decision to accept Cheil's method of accounting for recycled scrap is remanded in light of *Ipsco's* reversal.

9. *Commerce's Determination That Cheil Reported All Direct And Indirect Costs Incurred From "Reslitting" Certain PET Film:*

Finally, plaintiffs argue that the ITA neglected to include costs for depreciation, energy, factory overhead, and waste associated with "reslitting" certain PET film. The record shows that there are a number of processing steps required to produce PET film. Raw materials are first processed into PET film chips. The chips are then melted together and extruded into sheet film. The sheet film then undergoes at least two stretching operations to impart to it strength and unique physical properties. The stretched film is crystallized before undergoing edge trimming and winding into "mill rolls." Scrap material is crushed and returned to the beginning of the production process. The PET film produced by Cheil is slit into customer-specified lengths and widths before sale. C.R. Document 90 at 6. However, [ ] PET film that is sold in the United States is reslit a second time into narrower widths. C.R. Document 83 at 16. Plaintiffs contend that the ITA did not include the full cost of reslitting in its constructed value computation.[5] Rather, the ITA accounted for reslitting of certain exports to the United States

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[5] **(e) Constructed value**

(1) Determination

For the purpose of this subtitle, the constructed value of imported merchandise shall be the sum of—

(A) the cost of materials * * * and of fabrication or other processing of any kind employed in producing such or similar merchandise * * *;

19 U.S.C. § 1677b(e)(1)(A).

by making a circumstance of sale adjustment to the foreign market value of unslit film by adding the variable cost of slitting. This adjustment, according to plaintiffs, included only variable labor costs, and erroneously neglected depreciation, energy, scrap loss, and factory overhead. *Plaintiffs' Brief,* at 88–89.

The ITA responds that costs for electricity, overhead and depreciation associated with reslitting were already included in the constructed value of the PET film. *Defendant's Memorandum II Opposition,* at 72. Cheil had [ ] PET film production lines. C.R. Document 90 at 8. For each production line, all of the costs incurred from operating the production line's equipment associated with production were captured. *Id.* at 18–21. Therefore, all of the costs of operating the slitting machines, whether for initial slitting or reslitting were recorded by Cheil and were subsequently allocated by the ITA to each PET film line's constructed value. *Defendant's Memorandum In Opposition,* at 72.

Upon due consideration, the Court finds the ITA's methodology adequately captured the disputed costs of factory overhead, depreciation, and energy. No adjustment was needed for the cost of waste produced from reslitting because edge trimmings were recycled into pellets. C.R. Document 99 at C183 and C190–191. Plaintiffs' characterization that these costs were not accounted for does not stand up in the face of the ITA's explanation. Plaintiffs have not provided any authority that the ITA was required to segregate the costs of the unslit film from the slit film for any or all of the production lines. More importantly, as the ITA has asserted, the costs of producing both widths were captured in the constructed value – which for example included the total energy cost of operating the factory for production of both widths of film. Therefore, no "additional" value was lost by the failure to segregate. Accordingly, the ITA's determination that Cheil's direct costs associated with reslitting [off-grade PET film] were fully accounted for by Cheil is supported by substantial evidence contained in the administrative record and is otherwise in accordance with law.

CONCLUSION

For the foregoing reasons, this case is remanded in part to the ITA. On remand, the ITA is instructed to recalculate the value-added tax adjustments in accord with 19 U.S.C. § 1677a(d)(1)(C) and not the general language of section 1677b(a)(4)(B) in accordance with this opinion. The ITA is directed to reexamine it's choice of methodology for calculating the production costs incurred by SKC and Cheil in producing off-grade finished PET films in light of *Ipsco's* reversal. The ITA is further directed to reexamine it's choice of cost accounting methodology for the calculation of Cheil's recycled scrap film in light of *Ipsco's* reversal. Finally, the ITA is directed to reexamine or comment on the effect of *Ipsco's* reversal upon its choice of SKC's product specific cost accounting methodology.

(Slip Op. 93–245)

D & L SUPPLY CO., GUANGDONG METALS & MINERALS IMPORT & EXPORT CORP., U.V. INTERNATIONAL, SIGMA CORP., SOUTHERN STAR, INC., CITY PIPE AND FOUNDRY, INC., LONG BEACH IRON WORKS, INC., AND OVERSEAS TRADE CORP., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND ALHAMBRA FOUNDRY INC., ALLEGHENY FOUNDRY CO., BINGHAM & TAYLOR DIV., VIRGINIA INDUSTRIES, INC., CHARLOTTE PIPE & FOUNDRY CO., EAST JORDAN IRON WORKS, INC., LEBARON FOUNDRY INC., MUNICIPAL CASTINGS, INC., NEENAH FOUNDRY CO., OPELIKA FOUNDRY CO., INC., TYLER PIPE INDUSTRIES, INC., U.S. FOUNDRY & MANUFACTURING CO., AND VULCAN FOUNDRY, INC., DEFENDANT-INTERVENORS

Consolidated Court No. 92–06–00424

Plaintiffs move for judgment on the agency record contesting the Department of Commerce, International Trade Administration's ("Commerce") (1) reliance on rates that were the subject of prior reviews as best information available; (2) refusal to receive and consider plaintiffs' comments in this proceeding; (3) increase of the antidumping duties payable by D & L Supply Co. from 11.66% to 92.74%, and (4) failure to institute reviews for China National Machinery Import and Export Corporation ("MACHIMPEX"), Liaoning, and use of "best information available" for determining foreign market value for MACHIMPEX Liaoning as a non-responsive company.

Held: Plaintiffs' motion is granted in part and this case is remanded to Commerce to (1) reevaluate whether the rate from the preceding review is still appropriate for use as BIA in this case once Commerce has recalculated the margins in the preceding case, and (2) assess duties against MACHIMPEX Liaoning at the 11.66% deposit rate that it paid upon importation.

[Plaintiffs' motion granted in part and denied in part; case remanded to Commerce.]

(Dated December 28, 1993)

Whitman & Ransom (Dennis James, Jr. and *Kathleen F. Patterson)* for plaintiffs D & L Supply Co. and Guangdong Metals & Minerals Import & Export Corporation.

Willkie Farr & Gallagher (Walter J. Spak, Christopher Dunn, Christopher S. Stokes and *Theodore C. Whitehouse)* for plaintiffs U.V. International, Sigma Corporation, Southern Star, Inc., City Pipe and Foundry, Inc. and Long Beach Iron Works, Inc.

Mudge, Rose, Guthrie, Alexander & Ferdon (N. David Palmeter, Jeffrey S. Neeley and *Richard G. King)* for plaintiff Overseas Trade Corporation.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Marc E. Montalbine);* of counsel: *Jeffery C. Lowe,* Attorney-Advisor, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for defendant.

Collier, Shannon, Rill & Scott (Paul C. Rosenthal, Mary T. Staley and *Robin H. Gilbert)* for defendant-intervenors Alhambra Foundry Inc., Allegheny Foundry Co., Bingham & Taylor Division, Virginia Industries, Inc., Charlotte Pipe & Foundry Co., East Jordan Iron Works, Inc., Lebaron Foundry Inc., Municipal Castings, Inc., Neenah Foundry Co., Opelika Foundry Co., Inc., Tyler Pipe Industries, Inc., U.S. Foundry & Manufacturing Co. and Vulcan Foundry, Inc.

OPINION

TSOUCALAS, *Judge:* Plaintiffs move for judgment on the agency record contesting the Department of Commerce, International Trade Administration's ("Commerce") determination in *Certain Iron Construction Castings From the People's Republic of China; Final Results of Antidumping Duty Administrative Review ("Final Results"),* 57 Fed. Reg. 24,245 (1992). Specifically, plaintiffs contest Commerce's (1) reli-

ance on rates that were the subject of judicially challenged prior reviews as best information available ("BIA"); (2) refusal to receive and consider plaintiffs' comments in this proceeding; (3) increase of the antidumping duties payable by D & L Supply Co. from 11.66% to 92.74%; and (4) failure to institute a review for China National Machinery Import and Export Corporation ("MACHIMPEX"), Liaoning and use of BIA for determining foreign market value for MACHIMPEX Liaoning as a non-responsive company.

On June 18, 1991, Commerce issued a notice of initiation of an administrative review for the period May 1, 1990 through April 30, 1991. *Initiation of Antidumping and Countervailing Duty Administrative Reviews ("1990–91 Initiation")*, 56 Fed. Reg. 27,943 (1991). Commerce subsequently issued its preliminary results of this review on February 27, 1992. *Certain Iron Construction Castings From the People's Republic of China; Preliminary Results of Antidumping Duty Administrative Review ("Preliminary Results")*, 57 Fed. Reg. 6,709 (1992). The Final Results were issued on June 8, 1992. *Final Results*, 57 Fed. Reg. at 24,245. Oral Argument was heard in this case on July 20, 1993.

Discussion

In reviewing a final determination of Commerce, this Court must uphold that determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1988). Substantial evidence has been defined as being "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). It is "not within the Court's domain either to weigh the adequate quality or quantity of the evidence for sufficiency or to reject a finding on grounds of a differing interpretation of the record." *Timken Co. v. United States*, 12 CIT 955, 962, 699 F. Supp. 300, 306 (1988), *aff'd*, 894 F.2d 385 (Fed. Cir. 1990).

1. *Best Information Available Rate:*

Plaintiffs D & L Supply Co. ("D & L") and Guangdong Metals & Minerals Import & Export Corporation ("Guangdong Minmetals") claim that Commerce erred in using as BIA a rate that was currently subject to judicial review. *Plaintiffs D & L Supply Co. and Guangdong Minmetals Memorandum of Points and Authorities in Support of Their Rule 56.1 Motion for Judgment on the Agency Record ("D & L Memorandum")* at 8. Plaintiffs U.V. International, Sigma Corporation, Southern Star, Inc., City Pipe and Foundry, Inc. and Long Beach Iron Works, Inc. ("U.V.") concur and claim that Commerce's use of BIA in this instance was arbitrary, political, capricious and an abuse of discretion. *Brief in Support of Motion of Plaintiffs U.V. International, Sigma Corp., Southern Star, Inc., City Pipe and Foundry, Inc., and Long Beach Iron Works, Inc., for Judgment Upon the Agency Record ("U.V. Brief")* at 2.

In the Final Results of this review, Commerce applied a margin of 92.74% as BIA. That margin had been calculated in the 1989–90 annual review, which was for the period preceding the review in this case. *See Final Results of Antidumping Duty Administrative Review: Certain Iron Construction Castings From the People's Republic of China,* 57 Fed. Reg. 10,644 (1992). Guangdong Minmetals also contested the Final Results for the 1989–90 review and recently the Court decided that case in *Sigma Corp. v. United States ("Sigma II"),* 17 CIT ____, Slip Op. 93–238 (Dec. 20, 1993).

In *Sigma II,* the Court remanded the case to Commerce to reconsider its use of Indian pig iron and scrap iron prices to calculate Sigma's and Guangdong Minmetals' foreign market value, and to recalculate freight costs using the information on the record which was submitted by respondents, among other calculations.

Plaintiffs now claim that since the rate from the prior review was being contested, it would have been more appropriate for Commerce to apply a rate as BIA that was not being contested in court. *D & L Memorandum* at 9; *U.V. Brief* at 12.

Commerce, however, deems its selection of BIA as proper stating that the mere filing of a summons and complaint initiating an action to challenge a prior Commerce decision does not negate Commerce's current decision. *Defendant's Memorandum in Opposition to Plaintiffs' Motions For Judgment on the Agency Record ("Defendant's Memorandum")* at 13–15. The Court agrees. If the filing of a summons and complaint precluded Commerce from using a prior margin as BIA, then a party could willfully eliminate certain rates for use as BIA simply by filing a summons and complaint challenging those earlier administrative reviews, whether or not the action was ultimately found to have merit.

Nevertheless, the fact remains that *Sigma II,* 17 CIT ____, Slip Op. 93–238, was remanded to Commerce for various calculations that will presumably change the margins used by Commerce in that review. Therefore, the issue in this case is remanded to Commerce, and once Commerce has recalculated the margins in the preceding case it should reevaluate the situation in this case and deem whether the rate from the preceding review is still appropriate for use as BIA.

2. *Procedural Due Process:*

Plaintiffs D & L, Guangdong Minmetals and U.V. also contest Commerce's refusal to accept plaintiffs' comments on the preliminary determination and state that to do so was a denial of plaintiffs' procedural due process rights. *D & L Memorandum* at 11; *U.V. Brief* at 3–4. Plaintiffs claim that their rejected comments merely requested that Commerce either use as BIA the rate from the original investigation which was the only rate not subject to judicial review or to hold the determination in abeyance until a correct BIA rate could be set following judicial review. Nevertheless, this issue was rectified in the preceding section of this

opinion as the Court stated that Commerce's BIA selection pends the outcome of Commerce's remand on the case in the preceding review.

In this case, Commerce returned comments filed by plaintiffs following the preliminary determination and stated that "[a]lthough comments were also submitted by two other importers, because they were untimely we did not consider them, and we returned them in accordance with 19 C.F.R. 353.38(a)." *Final Results,* 57 Fed. Reg. at 24,246.

Plaintiffs, however, do not contest that these comments were submitted untimely. Commerce's regulations state in pertinent part: "The Secretary will consider in making the final determination * * * or in the final results * * * only written arguments in case or rebuttal briefs filed within the time limits in this section." 19 C.F.R. § 353.38(a)(1992). Thus, Commerce acted properly in rejecting plaintiffs' untimely submissions and, therefore, its determination as to this issue was in accordance with law.

3. *Retroactively Increasing Dumping Duties:*

Plaintiffs D & L and Guangdong Minmetals also claim that Commerce erred by retroactively increasing the antidumping duties payable by D & L from 11.66% to 92.74%. *D & L Memorandum* at 14. Plaintiffs claim that this was unduly harsh and a denial of plaintiffs' substantive due process rights. *Id.* Plaintiffs state that the deposit rate on most of the merchandise that entered in 1990–91 was 11.66%. This amount was deposited by D & L on each entry. The merchandise was then sold to third parties. D & L claims that its prices to third parties took into account the 11.66% duty and to subsequently increase that duty to 92.74% is unduly harsh and oppressive. *Id.*

The Court disagrees. The uncertainty of knowing the final amount of duties due at the time of entry is simply an inherent part of importing merchandise into the United States. When importing merchandise into the United States, the importer must deposit the estimated amount of duties or post an appropriate bond. *See* 19 U.S.C. § 1505(a) (1988 & Supp. 1993). It is only later, at the time of liquidation, that the final duties upon the merchandise are assessed and, if the final duties are greater than the amount of estimated duties deposited, then the Customs Service collects the additional duties. *See id.* at 1505(b). Therefore, plaintiffs should have anticipated the possibility that additional duties would be owed and, therefore, they cannot now claim a due process violation. Thus, Commerce acted in accordance with law.

4. *Exclusion of Liaoning:*

Plaintiff Overseas Trade Corporation ("Overseas") is an American owned company located in Seattle, Washington. During the period of review in question in this case, Overseas purchased iron construction castings from China National Machinery Import and Export Corporation ("MACHIMPEX"), Liaoning. Overseas claims that Petitioner's failure to name MACHIMPEX Liaoning in its requests for reviews and Commerce's failure to institute reviews for that company was unsupported

by substantial evidence. *Plaintiff Overseas Trade Corporation's Brief in Support of its Motion for Judgment Upon the Agency Record ("Overseas Motion")* at 14.

Overseas claims that during the periods of review, MACHIMPEX Liaoning was a separate and distinct company from other companies bearing the MACHIMPEX name. Indeed, at one time, Liaoning was connected with the national headquarters in Beijing, but Overseas contends that this is no longer the case.

In its notice of initiation of antidumping and countervailing duty administrative reviews, Commerce named the companies it was reviewing including the Beijing branch of Minmetals, the Guangdong branch of Minmetals, the Liaoning branch of Minmetals, the Jilin branch of Minmetals, and the Anhui branch of Minmetals. *1990–91 Initiation,* 56 Fed. Reg. at 27,944. MACHIMPEX was not named and neither was MACHIMPEX Liaoning. *Id.* Commerce subsequently directed the sending of questionnaires to the firms named. Administrative Record ("AR") (Pub.) Doc. 7. No such questionnaire was sent to MACHIMPEX Liaoning.

Plaintiff Overseas now claims that MACHIMPEX Liaoning cannot be subject to these rates since it was a separate company from MACHIMPEX, and was not identified as a respondent by petitioner. Overseas claims that since it had no idea that it was subject to the review that its duties should be assessed at the 11.66% deposit rate that it paid upon importation. *Overseas Brief* at 15.

To add insult to injury, Commerce applied the BIA rule to MACHIMPEX Liaoning as an unresponsive company to calculate a dumping margin. *Id.* at 19. Overseas claims that Commerce's application was unsupported by substantial evidence since no review was requested of Liaoning and no questionnaire was served directly on that company. *Id.*

According to 19 U.S.C. § 1677e(c) (1988 & Supp. 1993), Commerce is authorized to use BIA when a party is unable or does not provide Commerce with the necessary information with which to make its determination. *Id.* In this case, Liaoning never refused and was never unable to supply the information. They did not respond since they were not given adequate notice that they were subject to review. *See Sigma Corp. v. United States ("Sigma I"),* 17 CIT ____, Slip Op. 93–230 (Dec. 8, 1993).

Furthermore, the Municipal Castings Fair Trade Council's request in both cases was not clear and understandable from the record. This Court has held that there is "a burden on the party making the request to submit a clear, understandable and comprehensive request within the deadline set by the regulation." *Floral Trade Council v. United States,* 13 CIT 142, 144, 707 F. Supp. 1343, 1344–45, *aff'd,* 888 F.2d 1366 (Fed. Cir. 1989). It is evident to the Court in this case that the request was not clear, understandable and comprehensive. In fact, the request did not list MACHIMPEX Liaoning.

Under the circumstances of this case, the Court cannot in all fairness deem MACHIMPEX Liaoning as within the scope of this review. Parties

"have an obligation to be precise in their requests thereby affording companies adequate notice to defend their interests." *Sigma I*, 17 CIT at ____, Slip Op. 93–230 at 20–21.

In two related cases, the Court held that adequate notice was not given to MACHIMPEX Liaoning that it was subject to a prior review and, therefore, the Court ordered the assessment of duties at the deposit rate that it paid upon importation. *See Sigma I*, 17 CIT at ____, Slip Op. 93–230 at 21; *Sigma II*, 17 CIT at ____, Slip Op. 93–238 at 20–21. The Court adheres to its decisions in *Sigma I* and *Sigma II* and likewise orders that Overseas' motion for judgment on the agency record regarding this issue is granted and its duties are to be assessed at the 11.66% deposit rate that it paid upon importation.

CONCLUSION

In accordance with the foregoing opinion, plaintiffs' motion for judgment on the agency record is granted in part and this case is remanded to Commerce to (1) reevaluate whether the rate from the preceding review is still appropriate for use as BIA in this case once Commerce has recalculated the margins in the preceding case, and (2) assess duties against MACHIMPEX Liaoning at the 11.66% deposit rate that it paid upon importation.

Plaintiffs' motion is denied in all other respects. Remand results are due within thirty (30) days of the date remand results in *Sigma II* are completed. Comments to remand results are due fifteen (15) days thereafter. Rebuttal comments are due within fifteen (15) days of the date comments are due.

(Slip Op. 93–246)

DUTY FREE INTERNATIONAL, INC., AMMEX WAREHOUSE CO., INC., AND AMMEX TAX & DUTY FREE SHOPS, INC., PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Court No. 91–07–00534

[Plaintiffs' motion and defendant's cross-motion for summary judgment are denied. Case is remanded to Customs for submission of administrative record and explanation of Customs' decision.]

(Decided December 29, 1993)

Tompkins & Davidson (Harvey A. Isaacs, Brian S. Goldstein and *Laurence M. Friedman),* for plaintiffs.

Frank W. Hunger, Assistant Attorney General, *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Susan Burnett Mansfield), Christopher Doherty,* United States Customs Service, of counsel, for defendant.

OPINION

DICARLO, *Chief Judge:* Plaintiffs, operators of a duty-free store near the Canadian border in New York State, seek revocation of the approval

by the United States Customs Service of the application by Git-N-Go ("GNG") to establish a duty-free store in the same vicinity. Plaintiffs allege that Customs' decision to approve GNG's application was arbitrary, capricious, an abuse of discretion, and not in accordance with law. Alternatively, plaintiffs request that the court remand the case to Customs for a redetermination of GNG's application. Plaintiffs also seek a declaratory judgment as to the meaning of certain terms used in 19 U.S.C. § 1555(b)(1988).

The court has jurisdiction under 28 U.S.C. § 1581(i). Plaintiffs and defendant have both moved for summary judgment pursuant to USCIT R. 56. The court finds that the record provides an insufficient basis for the court to review Customs' determination. Accordingly, the parties' cross motions for summary judgment are denied. The action is remanded to the District Director of Customs to compile the full administrative record in this matter, and to provide the court with a more complete explanation for his decision.

BACKGROUND

Plaintiffs operate a duty-free store on the East Service Road of Interstate Route 87 (I–87) near the Canadian border in Champlain, New York. The store is located immediately opposite Exit 43, which is the last exit off I–87 before the Canadian border. The distance between Exit 43 and the Customs port building at the Canadian border is approximately 3/4 of a mile. Once a vehicle from the East Service Road enters the northbound on-ramp of I–87, its only alternative to proceeding into Canada is to make an illegal U-turn on the highway.

On August 23, 1988, Congress adopted the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100–418, 102 Stat. 1107, which included provisions regulating the establishment of duty-free sales enterprises. Prior to the 1988 Act, duty-free stores were not governed by statute, but rather by Customs' administrative directives. Under the Act, duty-free stores are required to provide reasonable assurance of exportation of the duty-free merchandise sold by them. For that purpose, a duty-free store at the border must deliver duty-free merchandise "at a merchandise storage location at or beyond the exit point," unless the location was approved before the date of enactment of the Act. 19 U.S.C. § 1555(b)(3)(F). Because plaintiffs' store was approved before the date of enactment of the Act, it was grandfathered under the statute.

GNG's site is also located on the East Service Road at a distance south of plaintiffs' store. Thus, it is located further from the border. Unlike plaintiffs, GNG did not receive approval to operate its duty-free store until after enactment of the Omnibus Trade and Competitiveness Act of 1988. Therefore, GNG's operation must comply with the terms of the Act.

On July 16, 1990, GNG filed a letter application with the District Director, describing its proposed merchandise delivery procedure. Pls.' Br. Ex. G (Letter to District Director of Customs, from Matthews, Git-N-Go, dated July 16, 1990). Under this procedure, after a customer makes a

purchase from GNG, the merchandise is taken from the store by a Customs bonded cartman and delivered to the purchaser at a point between the GNG store and plaintiffs' store, approximately 2/10 of a mile south of the entrance to I–87. The cartman then advises the purchaser that the goods must be exported to Canada and watches the purchaser's vehicle until it enters the northbound on-ramp of I–87. On July 18, 1990, Customs' Port Director informed Git-N-Go that the outlined procedure "would meet basic export requirements." Def.'s Br. App. at 6 (Letter to Matthews, Git-N- Go, from C.J. Krul, Area Port Director, dated July 18, 1990). On May 20, 1991, Customs approved GNG's application, contingent upon continued adherence to the delivery procedures approved by Port Director Krul. Def.'s Br. App. at 7 (Letter to Matthews, Git-N- Go, from Walgreen, Director of Inspection & Control, dated May 20, 1991).

Following approval under the terms described above, GNG proposed, as an alternate method of delivery, that it be permitted deliver the merchandise at the GNG store in a cordoned area of its parking lot, and have the bonded cartman escort all vehicles containing merchandise to the northbound on-ramp of I–87. Pls.' Br. Ex. G (Letter to Walgreen, Director of Inspection & Control, from Spiegel, Trans-Border Customs Service, Inc., dated October 1, 1991). To assist in consideration of this proposed alternate delivery procedure, the District Director requested internal advice from Customs Headquarters. Customs Headquarters issued a ruling on March 18, 1992, holding that the proposed alternate delivery procedure did not comply with the statutory requirement that duty-free merchandise must be delivered "at or beyond the exit point." Pls.' Br. Ex. H (Letter to District Director from Durant, Director of Commercial Rulings Division of Customs, HQ 223751, dated March 18, 1992).

At issue is whether Customs' approval of GNG's current delivery procedure is consistent with the requirement of 19 U.S.C. § 1555(b) that a duty-free store must deliver duty-free merchandise at "a merchandise storage location at or beyond the exit point."

DISCUSSION

1. *Standard and Scope of Review:*

In an action brought under 28 U.S.C. § 1581(i), the court is required to review the matter as provided in 5 U.S.C. § 706. 28 U.S.C. § 2640(d) (1988). Under Section 706, the court shall hold unlawful and set aside an agency's decision found to be arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. In making this determination, the court shall review the whole record or those parts of it cited by a party. 5 U.S.C. § 706 (1988).

Summary judgment is granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *See* USCIT R. 56(d). The summary judgment procedure generally is appropriate in cases in which the court is asked to review a decision of an administrative agency. Since the agency, in most cases, is the fact finder, the court simply takes the facts as found by the agency and deter-

mines whether the administrative action is consistent with law. *See* 10 A Wright, Miller & Kane, Federal Practice and Procedure § 2733 (2d ed. 1983). However, summary judgment may not be appropriate where the case is one of first impression and the potential impact of the decision is uncertain. *See id.* § 2725. In that situation, a more complete development of the record may be necessary in order for the court to properly apply the law.

Here, the court is called upon to determine, for the first time, the propriety of Customs' application of the statute regulating duty-free stores. Given the novelty and potential impact of the action, the court finds that a further development of the record is necessary to clarify the facts and to determine the propriety of Customs' application of the law to the facts presented. In addition, without a more complete record, the court is unable to determine the merits of the case under the applicable standard of review provided in 5 U.S.C. § 706. Accordingly, the court denies the parties' cross motions for summary judgment.

2. *Whether GNG's delivery is "at or beyond the exit point":*

The statute governing the establishment of duty-free stores provides: Each duty-free sales enterprise –

> (A) shall establish procedures to provide reasonable assurance that duty-free merchandise sold by the enterprise will be exported from the customs territory; * * * and
>
> * * * * * * *
>
> (F) shall deliver duty-free merchandise –
>
> * * * * * * *
>
> (ii) in the case of a duty-free sales enterprise that is a border store –
>
> (I) *at a merchandise storage location at or beyond the exit point; or*
>
> (II) at any location approved by the Secretary before the date of enactment of the Omnibus Trade Act of 1987 [sic].

19 U.S.C. § 1555(b)(3) (emphasis added).

Plaintiffs assert that GNG's delivery location is not "at or beyond the exit point" – i.e. Exit 43 – because that location is 2/10 of a mile south of the Exit. Defendant contends, however, that Customs' approval of GNG's current delivery procedure constitutes the agency's interpretation of a statute it is charged with implementing and, as such, is entitled to considerable deference. According to defendant, the statute only requires that a duty-free store provide "reasonable assurance" of exportation, not an absolute guarantee of exportation. In its view, GNG's current delivery procedure meets that requirement.

When the court reviews an agency's construction of a statute which it administers, it must first determine "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842–3 (1984) (footnote omitted).

In determining whether Congress has directly spoken to the question at issue, the court looks first to the statutory language. If the statutory language is unclear, the court then attempts to discern Congress' intent from the legislative history of the statute. *Blum v. Stenson*, 465 U.S. 886, 896 (1984).

A review of the relevant portions of the statute does not reveal what Congress intended when it required that duty-free merchandise be delivered "at or beyond the exit point." 19 U.S.C. § 1555(b)(3)(f)(ii)(I). The statute defines the term "exit point" as "the area in close proximity to an actual exit for departing from the customs territory." 19 U.S.C. § 1555(b)(8)(F). However, it fails to define "in close proximity to an actual exit" and the term "at or beyond."

Since the statute is not unambiguous on its face, the court must look to the legislative history for assistance in determining the meaning of these terms. The Senate Report of the Omnibus Trade and Competitiveness Act of 1988 provides the following guidance:

> Delivery of duty-free merchandise in the case of border stores would be permitted only at a merchandise storage location at or beyond the exit point. This limitation is necessary because *unless duty-free merchandise is delivered at a Point at which the departing purchaser has no alternative but to leave the United States, there is no feasible way to assure that the goods are exported.*

S. Rep. No. 100–71, 100th Cong., 1st Sess., 233 (1987) (emphasis added).

It appears from the above that delivery of duty-free merchandise should take place "at a point at which the departing purchaser has no alternative but to leave the United States." Unless duty-free merchandise is delivered at such a point, "there is no feasible way to assure that the goods are exported." *Id.* This indicates the understanding of the drafters of the Senate Report as to what would constitute "reasonable assurance" of exportation at a delivery location. If the court were to accept this as the intent of Congress, the court, as well as the agency, would be required to give effect to it. *Chevron*, 467 U.S. at 843.

Customs has given effect to the position taken in the Senate Report. A reading of Customs' regulations implementing 19 U.S.C. § 1555(b)(8)(F) reveals a definition of the term "exit point" that is nearly identical to the definition indicated in the above Senate Report. The regulations provide, in pertinent part:

> The exit point in the case of a land border * * * is the point at which a departing individual has *no practical alternative* to continuing on to a foreign country or to returning to Customs territory by passing through a U.S. Customs inspection facility.

19 C.F.R. § 19.35(d) (1993) (emphasis added). The court notes that the regulations were published in proposed form, but were not in effect

when GNG's application was approved.[1] Nonetheless, defendant acknowledges that the draft regulations constituted' Customs' interpretation of the statute at the time of the approval of GNG's application.

It appears from the foregoing that the question of whether it was properly determined that GNG's delivery location is "at or beyond the exit point" could be answered if the court was able to discern, from the record before it, whether a purchaser at that location has a practical alternative to leaving the country. The parties offer differing responses to this question.

Plaintiffs allege that such an alternative exists. In particular, a vehicle can avoid entering the northbound on-ramp at Exit 43 of I–87 by passing the Exit, turning around at the dead end of the East Service Road, and proceeding south along the East Service Road, thereby never leaving the United States. Alternatively, plaintiffs maintain, a GNG customer can drive into the parking lot of plaintiffs' store located opposite Exit 43, and later exit the parking lot and proceed south along the East Service Road without being monitored by a GNG cartman, again never leaving the United States.

Defendant concedes such possibilities exist,[2] but denies that these possibilities constitute a "practical alternative" to leaving the country, within the meaning of the statute. According to defendant, the court should defer to the agency's application of the statute and regulations unless it finds the application lacks a rational basis in fact.

In order to determine whether deference is proper under these circumstances, the court must look to the record. The May 20, 1991 letter from the Director of Inspection & Control merely states that Customs' approval is conditioned on GNG's "continued adherence to the merchandise delivery procedures approved by Area Port Director Casimir Krul in his memorandum dated July 18, 1990." Def.'s Br. App. at 7 (Letter to Matthews from Walgreen, dated May 20, 1991). Mr. Krul's memorandum dated July 18, 1990 contains only one sentence: "Your outlined procedures for the purpose of a Duty Free Operation located on the East Service Road of I–87 would meet basic export requirements." Def.'s Br. App. at 6 (Letter to Matthews from Krul dated July 18, 1990).

The sparse record before the court does not allow the court to determine whether Customs' application lacks a rational basis in fact, because it does not disclose the basis of Customs' approval of GNG's current delivery procedure. Without such disclosure, the court is unable to determine whether the decision was based on "a consideration of the relevant factors" and whether there was "a clear error of judgment." *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 416 (1971).

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[1] The regulations were published in proposed form on May 17, 1991, 56 Fed. Reg. 22,833 (1991), and became effective on October 19, 1992. 58 Fed. Reg. 29,349 (1993).

[2] In its pleading, defendant denies plaintiffs' allegation that a practical alternative exists for a departing purchaser from the GNG store "to the extent the allegation may be deemed an allegation of fact." Answer paragraphs 14, 15. However, defendant conceded at the court conference held on November 30, 1993, that it is possible for a departing purchaser to make a U turn and not to depart the United States at GNG's delivery location. Tr. at 18.

The court finds that the ruling letter subsequently issued by Customs Headquarters regarding GNG's proposed alternate delivery procedure sheds light on the relevant factors that should be considered in determining whether GNG's current delivery procedure complies with the statute. Pls.' Br. Ex. H (Letter to District Director from Durant, dated March 18, 1992). Under GNG's proposed alternate delivery procedure, duty-free merchandise would have been delivered to the purchasers in the parking lot of the GNG store. Then, a bonded cartman would have followed the vehicles to the northbound on-ramp of Exit 43 and observe them proceeding onto the Interstate. Customs Headquarters held that this procedure would not comply with the statute.

This holding was based on two grounds. First, noting the District Director's finding that "persons who receive merchandise in the GNG parking lot have the ability not to depart the United States," *id.* at 1, the ruling letter concluded that GNG's parking lot does not constitute a storage location "at or beyond the exit point." *Id.* at 2–3. Second, the ruling letter reasoned:

> *Customs does not have any statutory authority to enforce GNG's monitoring of the delivery process.* In other words, if GNG were to stop escorting the purchaser's vehicle to the entrance ramp of Exit 43, Customs would have no legal recourse against GNG either under the statute or under the bond. As a bonded warehouse operator, GNG is only required to comply with all regulations regarding the receipt and safekeeping of the bonded merchandise. Therefore, Customs would have to rely on GNG's voluntary compliance with this procedure. * * * *Also, GNG does not have a financial incentive to report persons who fail to depart the U.S. since GNG, as the importer, would then become liable for duties.*

Id. at 3 (emphasis added).

It appears to the court that Headquarters' reasoning with regard to the proposed alternate delivery procedure would be applicable to GNG's current delivery procedure. The court is aware that GNG's parking lot is located further away from Exit 43 than GNG's current delivery location. Nevertheless, at both locations, purchasers have the ability not to depart the United States, and both procedures rely on a cartman's monitoring of purchasers' departure. If "Customs does not have any statutory authority to enforce GNG's monitoring" in the proposed alternate delivery procedure, what authority does Customs have to enforce GNG's monitoring in the current delivery procedure? Does GNG have a financial incentive in the current delivery procedure, which is not present in the proposed alternate delivery procedure, to report persons who fail to depart the United States? In sum, the court finds it difficult to understand why the enforcement problems that prevented Customs from approving the proposed alternate delivery procedure do not apply with equal force to the current delivery procedure.

The District Director is permitted to seek Headquarters advice in making his decision as to what constitutes the exit point or reasonable assurance of exportation, *see* 19 C.F.R. § 19.35(d), as he did regarding

GNG's proposed alternate delivery procedure. The court notes that no request for Headquarters opinion was made with respect to GNG's current delivery procedure. Moreover, the ruling letter specifically stated that the ruling is "not to be considered as ratification of the approval" given to the current procedures. Instead, the ruling letter proceeded on the assumption that the approval "comes within the express language" of the statute, and does not consider that prior approval. Since Congress enacted 19 U.S.C. § 1555(b) to "encourage uniformity and consistency of regulation of duty-free sales enterprises," Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100–418, 102 Stat. 1107, 1315, and in the interest of uniform application of the statute, the court remands the case to the District Director with the instruction that he seek internal advice from Customs Headquarters regarding GNG's current delivery procedure and that Headquarters address the concerns and questions raised in this opinion.

3. *"Merchandise storage location":*

In addition to delivery "at or beyond the exit point," the statute further requires that a duty-free store shall deliver duty-free merchandise "at a merchandise storage location." 19 U.S.C. § 1555(b)(3)(F)(ii)(I). Plaintiffs contend that the vehicle used by GNG for transportation and immediate delivery of duty-free merchandise cannot be rationally construed as a "merchandise storage location."

The term "merchandise storage location" is not defined by the statute. Nor does the legislative history of the statute provide any explanation as to the meaning of the term. When Congress has not directly addressed the precise question at issue, the court does not simply impose its own interpretation. *Chevron,* 467 U.S. at 843. "Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* (footnotes omitted).

Defendant asserts that it is Customs' interpretation that delivery may be made by a cartman if the District Director is provided with proper assurances of exportation. To support its position, defendant draws an analogy between a cartman's vehicle and a "crib location" which is provided for within Customs regulations. *See* 19 C.F.R. § 119.37(a). Plaintiffs contend that defendant's analogy amounts to a *post hoc* rationalization for Customs' approval of GNG's application.

It is well settled that the court may not accept counsel's post hoc rationalizations for agency action. *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156, 168 (1962). "The grounds upon which an administrative order must be judged are those upon which the record discloses that [agency] action was based." *SEC v. Chenery Corp.,* 318 U.S. 80, 87 (1943). Once again, however, the record before the court does not disclose the grounds upon which Customs' decision was based. Consequently, the court is unable to determine whether Customs properly applied the term "merchandise storage location" in this situation. Therefore, the court remands the case to the District Director for him to

explain why a cartman's vehicle used solely for transportation and delivery of duty-free merchandise was considered within the meaning of "a merchandise storage location" under the statute.

CONCLUSIONS

The record submitted by the parties is insufficient for the court to review Customs' decision by the applicable standard of review. Accordingly, the court denies plaintiffs' motion and defendant's cross motion for summary judgment. The case is remanded to the District Director to submit a more complete agency record pertaining to the approval of GNG's current delivery procedure and to provide an adequate explanation for the approval. In the interest of uniform application of the statute, the court directs the District Director to seek internal advice from Customs Headquarters regarding the following questions:

(1) Whether a "practical alternative" within the meaning of 19 C.F.R. § 19.35(d) exists for a purchaser of duty-free merchandise at GNG's delivery location where the purchaser has the ability to not depart the United States and the assurance of exportation depends upon a cartman's monitoring of the purchaser's departure. If the answer is that no practical alternative exists, then Customs is directed to explain the differences between the cartman's monitoring in this situation and that in GNG's proposed alternate delivery procedure, in view of Headquarters ruling letter, HQ 223751.

(2) Whether a cartman's vehicle used to transport duty-free merchandise from a warehouse to a location for immediate delivery to the purchaser is within the meaning of "a merchandise storage location" under 19 U.S.C. § 1555(b)(3)(F)(ii)(I).

Defendant shall file its remand results within 60 days of this opinion. Plaintiffs shall file a motion for judgment upon an agency record pursuant to USCIT R. 56.1 within 30 days thereafter. Defendant's response and plaintiffs' reply thereto shall be filed in accordance with USCIT R. 56.1(d).

(Slip Op. 93–247)

FORMER EMPLOYEES OF VTC INC., PLAINTIFFS *v.*
ROBERT B. REICH, U.S. SECRETARY OF LABOR, DEFENDANT

Court No. 91–10–00719

[Plaintiffs' motion for judgment on the agency record denied; action dismissed.]

(Decided December 30, 1993)

Martha Crump pro se.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Jeffrey M. Telep);* and Office of the Solicitor, U.S. Department of Labor *(Scott Glabman),* of counsel, for the defendant.

MEMORANDUM

AQUILINO, *Judge:* This action contests denial by the U.S. Department of Labor of certification of eligibility to apply for adjustment assistance under the Trade Act of 1974, as amended, *sub nom. Determinations Regarding Eligibility to Apply for Worker Adjustment Assistance; Negative Determinations; TA–W–25,789; VTC, Inc., Subsidiary of Control Data Corp., Bloomington, MN,* 56 Fed.Reg. 31,678 (July 11, 1991), and *VTC Inc., Subsidiary of Control Data Corp.; Bloomington, MN; Negative Determination Regarding Application for Reconsideration,* 56 Fed.Reg. 37,929 (Aug. 9, 1991).

I

The record developed in conjunction with those proceedings contains a petition for such assistance signed by three individuals[1], identifying themselves as involved in "assembly" at VTC Inc. who were separated from work on May 31, 1991. The petition alleged that they "manufacture[d]" computer circuits into packages and that, over the last several years, "more and more of the packages have been sent 'overseas' to be done cheaper"[2], thereby forcing the petitioners out of their jobs.

This petition caused the Office of Trade Adjustment Assistance, Employment and Training Administration of the Department of Labor to investigate eligibility to apply for certification pursuant to 19 U.S.C. ch. 12, part 2, subpart A. Section 2272 thereof provides:

> **Group eligibility requirements; agricultural workers; oil and natural gas industry**
>
> (a) The Secretary shall certify a group of workers * * * as eligible to apply for adjustment assistance under this part if he determines—
>
> (1) that a significant number or proportion of the workers in such workers' firm or an appropriate subdivision of the firm have become totally or partially separated, or are threatened to become totally or partially separated,
>
> (2) that sales or production, or both, of such firm or subdivision have decreased absolutely, and
>
> (3) that increases of imports or articles like or directly competitive with articles produced by such workers' firm or an appropriate subdivision thereof contributed importantly to such total or partial separation, or threat thereof, and to such decline in sales or production.

After investigating, the Department decided that the criteria of subparagraph (a)(3) for assistance had not been met upon the stated rationale that the evidence developed

> revealed that employment and production declines at the subject plant resulted from the sale of the business to other domestic companies.

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[1] *See* Public Record ("PubRec"), p. 2.

[2] *Id.*

> The investigation further revealed that projects assembled at the subject plant were highly classified and could only be assembled in the United States.[3]

Whereupon the Department concluded that "[i]ncreased imports did not contribute importantly to worker separations at the firm"[4] and therefore denied the petitioners certification of eligibility to apply for adjustment assistance.

Petitioner Crump requested reconsideration "based on additional information that was not disclosed * * * regarding the overseas production for VTC Inc."[5] Her request explained that in September 1990 the firm had split into three separate divisions, VTC Bipolar, VTC Cmos and the Assembly Department[6], and asserted that, due to

> VTC Bipolar's plan to have all of it[ ]s products assembled overseas for lower cost reasons, the Assembly Department was given a plant shut down notice, * * *. There were no plans to sell the Assembly Department to a domestic company.[7]

The petitioner also addressed the Department's position regarding allegedly highly classified projects which could only be assembled in the United States:

> Another issue that was deemed not to meet the criterion for number three [19 U.S.C. § 2272(a)(3)] was the assembly of highly classified projects that could only be assembled in the United States. Although some of the products assembled at VTC Inc. were in fact classified, the majority of the assembly was non classified. The existence of classified products did not come into effect until the last quarter of 1989.
>
> The assembly employees who assembled that classified work were transferred from the non classified work area and were told that when the "government contracts" were completed, they would return to the non classified assembly area.
>
> The vast majority of the assembly done at VTC Inc. was non classified work. Over a period of years, VTC Inc. increased it[ ]s exportation of this work overseas until the final decision was made by the new "VTC Bipolar" to send it all overseas.[8]

After further inquiry, the Department denied the request for reconsideration, stating that:

> Investigation findings show that Control Data disposed of VTC in three pieces – by selling VTC Bipolar in October 1990 and VTC Cmos in January 1991 and retaining only a small assembly and packaging operation for classified projects for Control Data. Other investigation findings show that since the last quarter of 1989, the vast majority of the assembly and packaging work was for classified

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[3] *Id.* at 26.
[4] 56 Fed.Reg. at 31,678.
[5] PubRec, p. 31.
[6] *See id.*
[7] *Id.*
[8] *Id.* at 32.

> projects which for national security reasons could only be assembled in the United States. Workers in the remaining small packaging unit were laid off in May 1991 because their customer chose not to remain in the classified semi-conductor business.[9]

In other words, upon reconsideration, the Department concluded anew that the criteria of 19 U.S.C. § 2272(a)(3) were not met. This action ensued.

II

The plaintiffs have now filed a Motion for Judgment, which asserts:

> The official record does not address the products previously assembled by the employee[ ]s of VTC Inc. that were transferred overseas to be built in the years preceding the Department closing in 1991, nor does it address the percentage of product still being assembled overseas for VTC Inc. at the time of the Department closing in May of 1991. The official record also does not address what size work force would VTC Inc. have been able to sustain in 1991 if the products were still being assembled by the employee[ ]s of VTC Inc. at the time the Government Contracts were lost. The official record also does not address what products were shipped overseas to be assembled at, or around the time of the Department shutdown, which had previously been assembled by the employee[ ]s of VTC Inc.
>
> The official record is much to[o] vague on many of th[e] facts that are needed to make a[n] objective opinion on how the assembly employee[ ]s of VTC Inc. were adversely affected by the increase of imports by VTC Inc. itself. The assembly of Government Contracts at the time of the Department shut down in and of itself should not be the only or determining factor in concluding that the employee[ ]s of VTC Inc. were not adversely affected by increased imports, but instead it should have been taken into account what size work force would have been sustained by VTC Inc. had they not chosen to send products overseas that were previously manufactured by the employees of VTC Inc.[10]

A

In reviewing the Department's findings and conclusions,, this court must determine whether they are supported by substantial evidence on the record. *See* 19 U.S.C. § 2395(b). Substantial evidence has been held to be that which reasonably supports a conclusion. *E.g., Ceramica Regiomontana, S.A. v. United States,* 10 CIT 399, 405, 636 F.Supp. 961, 966 (1986), *aff'd,* 810 F.2d 1137 (Fed.Cir. 1987).

After receiving the petition, the Department requested information from the parent corporation of VTC Inc. to help determine "whether increased imports have contributed importantly to actual or threatened decreases in employment and to decreases in sales or production at the

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[9] 56 Fed. Reg. at 37,929.

[10] Motion for Judgment, pp. 1–2.

petitioning workers' plant."[11] Based on the information provided, the Department issued its initial negative determination *supra.* Upon the request for reconsideration, the Department once again contacted the parent corporation to address points raised therein.[12] After obtaining a response, the Department denied the renewed request for relief upon the rationale recited above.

This court has reviewed the confidential version of the administrative record and finds that it supports the determination that, although the assembly department was primarily involved in nonclassified projects, plaintiffs' positions in that department were terminated as a result of the sale of business to other domestic companies and not because of increased imports.[13] That is, much of the confidential information in the record contradicts assertions in both the petition and the request for reconsideration. Instead, the record contains substantial evidence in support of the Department's negative determination. Hence, this court cannot conclude that it was unreasonable for the Department to forego attempting to gather additional information as to issues raised by the petitioner(s) in the light of the fact that its initial investigation and subsequent contact with the parent corporation of VTC provided enough data to determine that their separations were not the result of increased imports.

It is well-settled law that the nature and extent of an investigation are matters resting within the sound discretion of administrative officials. *E.g., Former Employees of CSX Oil and Gas Corp. v. United States,* 13 CIT 645, 651, 720 F.Supp. 1002, 1008 (1989). Furthermore, "this court must show substantial deference to the agency's chosen technique, only remanding a case if that technique is so marred that the Secretary's finding is arbitrary or of such a nature that it could not be based on 'substantial evidence.'" *United Glass & Ceramic Workers of North America v. Marshall,* 584 F.2d 398, 405 (D.C. Cir. 1978). This is not apparent in the present action. The Department's findings are not arbitrary; they are supported by substantial evidence on the record. Accordingly, the Department's determination must be affirmed and judgment entered in defendant's favor.

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[11] PubRec, p. 13.

[12] *See* Confidential Record, pp. 14–16, 34–36.

[13] *See id.* at 35–36.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C93/168 12/30/93 DiCarlo, J.	Madge Networks, Inc.	92–07–00476	8517.82.0080–3 4.7%	8471.99.1500–8 Duty-free 8517.82.0080–3 4.7% 8524.90.4080 9.7¢/m^2 of recording surface	Agreed statement of facts	San Francisco Local area network (LAN) equipment
C93/169 12/30/93 DiCarlo, J.	Singer Sewing Company	93–07–00419	8452.10.00, 8452, 8452.10.00 not over $20 each Other 3.7%	8452.21, 8452.21.90 Other 2.5%	Pfaff American Sales Corp. *v.* United States Slip Op. 93–101 (June 9, 1993), Court No. 91–03–00202	Memphis, TN 14U over-edger sewing machines

ABSTRACTED VALUATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	VALUATION	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
V93/32 12/30/93 DiCarlo, J.	Alexander's, Inc.	92–02–00099	Not stated	Entered values less additional duties and interest paid	Nunn Bush Shoe Co. *v.* United States 784 F. Supp. 892 (CIT 1992)	Port: Not stated Footwear
V93/33 12/30/93 DiCarlo, J.	Thom McAn	92–02–00116	Not stated	Entered values less additional duties and interest paid	Nunn Bush Shoe Co. *v.* United States 784 F. Supp. 892 (CIT 1992)	Port: Not stated Footwear

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